OUTLINES OF EQUITY.

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A CONCISE VIEW

OF

THE PRINCIPLES OF MODERN EQUITY.

BY

SYDNEY E. WILLIAMS,

OF LINCOLN'S INN, BARRISTER-AT-LAW,

Author of "The Law of Account," "The Law relating to Legal Representatives," "The Law & Practice relating to Petitions," "Forensic Facts & Fallacies," and Editor of "Smith's Manual of Equity," 15th Edition.

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PREFACE.

THOUGH this little book may not merit the description "*Parvus est libellus at medulla scatet*," it contains a great deal of matter in a small compass, and is an attempt to put the pith of the subject into a few pages. As a pocket compendium, it is hoped that it may prove of use to the Profession in furnishing aids to the Student and reminders to the busy Practitioner. A great amount of time and labour, out of all proportion to the size of the book, has been expended in reducing it to its present dimensions, with the object of placing before the reader an accurate and fairly comprehensive view of the subject according to the latest decisions. How far the Author has succeeded must be left for others to judge.

S. E. W.

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April, 1900.

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OUTLINES OF EQUITY.

CHAPTER I.

EQUITY: ITS ORIGIN AND NATURE.

EQUITY was in its origin a system of relief designed to meet the shortcomings of the common law, "to relieve against its abuse or allay its rigour." (2 P. Wms. 753.) We say *system* because from very early times it was not natural justice nor an arbitrary jurisdiction according to the foot or even the conscience of the Lord Chancellor, but a system having regard to former rules, principles and precedents. Law was certain, equity was flexible. But certainty, however good and essential in law, is apt to work hardship, and when the common law became Procrustean, it was then that equity intervened to relieve the hardships that inflexible rules must always entail. It is to a great extent true that equity arose from the inability of human foresight to establish any rule which, however salutary in general, does not in some instances become unjust and oppressive, and operate beyond or in opposition to its intent. And though this also applies to equity, for courts of equity are also reluctant to depart from general principles upon slight inconveniences and mischiefs, yet it

does not apply to the same extent or in the same degree to equity. The difference, therefore, between equity and common law is one more a matter of degree than anything else; for equity not only follows the law, but "walks arm-in-arm with precedent." Hence the truest definition of equity is that equity gives relief where law fails.

It follows that no exact definition of equity can be given. Its origin and development are historical rather than scientific. To fully explain the nature of equity jurisprudence it would, therefore, be necessary to give a detailed account and history of the common law, showing the numerous instances in which the latter refused relief. This, of course, we do not propose to do here. We shall content ourselves by merely pointing out the main principles and objects of equity, not as a science but as a category, that is, as a branch of the jurisdiction which is now exercised by the High Court.

Lord Coke, in his summary manner, stated that three things were to be judged in courts of equity: covin, accident and breach of confidence, that is, fraud, accident and trusts. Blackstone, following on the same lines, stated that courts of equity were established to detect latent frauds or concealments, to enforce matters of trust and confidence, to deliver from such dangers as are owing to misfortune or oversight, and to give more specific relief and more adapted to the circumstances than can be obtained by the rules of common law. These two general descriptions give a very fair general idea of the objects and scope of equitable jurisdiction. It may be useful to add a third, namely, that courts of equity had jurisdiction where a *plain, adequate and complete* remedy could not be had at common law. The remedy must have been plain, for if doubtful or obscure,

equity asserted jurisdiction; it must have been adequate, for if it fell short at law, that gave equity jurisdiction; it must have been complete, and reached the whole mischief and secured the whole right, otherwise equity would interfere.

The above descriptions are not, and do not pretend to be, exact or perfect; but they are sufficient to give a general view of the subject, and will probably be found more useful to the student than a more comprehensive and elaborate definition. It is, however, important and necessary to point out, in one respect at least, the limits of those definitions, and, consequently, the limits of equity jurisdiction. It has already been observed that equity is not natural justice. There are many rights which equity will not enforce; there are many wrongs which equity will not redress. A court of equity is not a court of conscience, but is governed by established rules and precedents; and "after all, the question to what extent a court of equity will go is very largely one of authority as to what has been done before." (*Re Scott and Alvarez*, (1895) 2 Ch. at p. 615.) It will not, therefore, recognise every injury, loss or inconvenience as a ground for relief. (*Day* v. *Brownrigg*, 10 C. D. 307.)

There are cases of fraud, of accident, of mistake in which neither courts of law nor equity presume to grant relief. And where the law has determined a matter, equity will not interfere notwithstanding accident or unavoidable necessity. Thus a man may by accident omit to make or complete a will, yet there is no relief. So cases of trust may exist in which the parties must abide by their own false confidence in others without any aid from the Court. And there are many cases of non-performance of conditions precedent which are

equally without redress. These are but a few among many instances which might be given to show that even in cases ostensibly within the scope of equity jurisdiction there are many exceptions, and to show that equity is not only bound by precedent and principle, but conforms to and does not contradict the law.

It will be seen, therefore, that the true nature and extent of equity jurisdiction, as at present administered, must be ascertained by a specific enumeration of its actual limits in each particular class of cases falling within its remedial justice. And this will accordingly be done in the subsequent pages. But before proceeding to do this, it will first be necessary to consider very shortly how far the Judicature Acts have affected equity jurisprudence, or rather equity jurisdiction; for it may be said at once that the Acts do not alter rights, but only deal with remedies. (*Lyell* v. *Kennedy*, 20 C. D. 489, 491.)

The effect of the Judicature Acts is not, as so often supposed, to fuse law and equity. The fusion is merely one of organisation. The Acts have not abolished the distinction between legal and equitable interests, but merely enable the High Court to administer legal and equitable remedies. (*Joseph* v. *Lyons*, 5 Q. B. D. 280, per Cotton, L. J.) Although the Act of 1873, s. 25 (11), provides that where there is a conflict or variance between the rules of law and equity the latter is to prevail, this only makes equity the predominant partner, which to a great extent it always was. With regard to injunctions and receivers, which by s. 25 (8) may be granted whenever "just or convenient," this does not alter the principles on which injunctions or receivers were formerly granted. (*Day* v. *Brownrigg*, 10 C. D. 307; *Holmes* v. *Millage*, (1893) 1 Q. B. 551.) And with regard to

discovery, the right of discovery under the Judicature Act is in principle not more extensive than it formerly was in Chancery (*Lyell* v. *Kennedy*, 8 A. C. p. 223), though the rights of discovery are not limited to those existing in Chancery, but embrace the rights formerly obtaining at common law. (*Brown* v. *Liell*, 16 Q. B. D. 229.)

It will be seen, therefore, that the changes made by the Judicature Act relate in a very slight degree, if at all, to the principles of equity jurisprudence which are the subject of the present treatise. Moreover, although the Act, s. 24, provides for the recognition by all divisions of the High Court of the principles adopted by the Court of Chancery, and thus, in theory at least, makes the courts of common law also courts of equity, yet in practice this object or effect of the Act is almost entirely frustrated by a subsequent provision of the same Act, which assigns to the Chancery Division the great bulk of the matters with which it was formerly concerned.

The section in question (s. 34) assigns to the Chancery Division all causes and matters for any of the following purposes:—

The administration of the estates of deceased persons.

The dissolution of partnerships or the taking of partnership or other accounts.

The redemption or foreclosure of mortgages.

The raising of portions or other charges on land.

The sale and distribution of the proceeds of property subject to any lien or charge.

The execution of trusts, charitable or private.

The rectification or setting aside or cancellation of deeds or other written instruments.

The specific performance of contracts between vendors

and purchasers of real estates, including contracts for leases.

The partition or sale of real estates.

The wardship of infants and the care of infants

Since the Act other matters have been assigned to the same division by various statutes, *e.g.*, those arising under the Conveyancing Acts, the Settled Land Acts, the Guardianship of Infants Acts, &c.

CHAPTER II.

GENERAL MAXIMS OF EQUITY.

THE general maxims of equity are important as laying down the leading principles of equity; indeed, some of them lie at the very root of equity jurisprudence. It is of importance, therefore, that they should be rightly understood and borne in mind whether in reading or in practice.

1. **Equity will not suffer a Wrong to be without a Remedy**, or, as it is sometimes expressed, a right to be without a remedy. The same thing is meant: equity will enforce a right and redress a wrong where there is no remedy at law. It is obvious, from what has already been said, that this maxim is the foundation of a large part of equity jurisprudence. To it we owe the important doctrine of uses and trusts, and in fact the whole jurisdiction of the Court of Chancery, for equity never gave relief where there was an adequate remedy at law. It is equally obvious, however, from the preceding chapter, that the maxim has certain limitations. It is evident that it only applies to such rights and wrongs as are judicially noticed—for equity is not a court of conscience, and takes no cognizance of moral rights and wrongs. It is no ground for interference, therefore, that a person has suffered inconvenience, or even loss, where that loss is without legal injury, for there is no

remedy in the case of *damnum absque injuria*. (*Day* v. *Brownrigg*, 10 C. D. 294; *Ajello* v. *Worsley*, (1898) 1 Ch. 274.)

2. Equity follows the Law.—This maxim is generally taken to mean that equity adopts and follows the rules of law, and acts in analogy to those rules wherever an analogy exists. We shall explain and illustrate this meaning presently. But the maxim has a more important and more extended meaning, and in this sense is, like the previous maxim, at the foundation of equity jurisdiction. In this sense the maxim means that equity "in some cases follows the law implicitly, in others assists it and advances the remedy; in others, again, it relieves against the abuse or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof." (*Cowper* v. *Cowper*, 2 P. Wms. 753.) In this sense, therefore, the maxim has a general application to the whole equitable jurisdiction, and means that courts of equity, though acting *secundum discretionem*, do not, as is so often supposed, act in opposition or antagonism to law, but in supplementing and assisting it.

In its narrower sense, however, as following particular rules of law, it may be useful to give an illustration. Thus equity is governed by the canons of descent, and has never interposed to prevent the hardship caused by the rule of primogeniture. Again, equity construes executed trusts in the same way as legal limitations, but in the case of executory trusts equity will construe them according to the intention of the party creating them, and will not construe technical expressions with legal strictness. Again, although courts of equity are not within the words of the Statute of Limitations, yet they are within its spirit and meaning, and have uni-

formly adopted its rules. (*Bulli Mining Co.* v. *Osborne*, (1899) A. C. 351.) From this it will be seen that equity follows the law only in the sense that it is controlled by the law. It really goes far beyond or ahead of the law, but in doing so it takes care not to run counter to established legal principles. And this is the true meaning of the maxim.

3. Where Equities are equal the Law will prevail.

4. Qui prior est tempore potior est jure.

These two maxims are in principle the same. Neither of them expounds any equitable principle except of a negative kind. Both to some extent illustrate the last preceding maxim, that equity follows the law, inasmuch as they both declare that where there is nothing to raise an equity the law will prevail; in other words, that where there is nothing to give rise to equitable jurisdiction the law will take its course.

The result, however, is of considerable importance, since the effect of these maxims is to give rise to the doctrines of notice, priority and tacking, which will be dealt with in a subsequent chapter (*post*, p. 108).

5. Equity looks upon that as done which ought to be done.—This means that where a person has incurred a legal obligation to do a certain thing, equity will regard it as done, and as consequently producing the same results and incidents as if it were actually done. Thus, if land is contracted to be sold, it will in equity be deemed to have been actually sold and converted, and all the consequences of such conversion will follow, so that if the vendor dies before completion the purchase-money passes under his will or goes to his next-of-kin.

This is the doctrine of conversion, which will be further considered in its proper place (*post*, p. 98). This maxim, though usually expressed in general terms, is by no means universally true. Where the obligation is not an absolute duty, but only an obligation arising from contract, that which ought to be done is only treated as done in favour of some person entitled to enforce the contract as against the person liable to perform it. (*Chetwynd* v. *Morgan*, 31 C. D. 596, 605, per Lindley, L. J.)

6. Equity imputes an Intention to fulfil an Obligation.—This maxim is very similar to the last, especially when put in another and perhaps better form, as equity imputes the fulfilment of an obligation. Thus, if a man covenants to buy and settle land, and subsequently buys land, but dies without settling it, this will generally be deemed to be done in performance or part performance of his covenant. This is what is known as the doctrine of performance, and will be further dealt with hereafter (*post*, p. 97).

7. He who seeks Equity must do Equity.—This is obviously nothing more than what is right and just. If a person seeks the assistance of equity, it is only natural and proper that the Court should require him to do what is right and reasonable. Thus, where an expectant heir or other person comes to the Court to set aside an unconscionable bargain or transaction, it is only right that the Court should insist as a condition of giving such relief that he should repay the money borrowed with fair interest (*post*, p. 34). Another illustration is afforded by the doctrine of a wife's equity to a settlement, for if a husband came to the Court to

get possession of his wife's property the Court would generally only render him assistance on condition that he made a fair settlement (*post*, p. 157).

8. He who comes into Equity must come with clean Hands.—Therefore he who seeks equity must not himself be guilty of inequitable conduct with regard to the transaction in question. If he seeks to set aside a fraudulent deed, he must not himself have participated in the fraud. So where an infant concealing his age obtains from his trustees money he is entitled to on coming of age, neither he nor his assignees can enforce payment over again of the money paid during the minority. (*Overton* v. *Banister*, 3 Ha. 503.)

9. Vigilantibus non dormientibus æquitas subvenit.—Equity will not help those who slumber over their rights. The Court discountenances sloth and laches, and, irrespective of the Statutes of Limitation, will refuse its aid to stale demands. The person seeking relief in equity must be active and vigilant in prosecuting his claim. There is, however, no hard and fast rule as to the time within which he must come to the Court, but each case must be decided with reference to the particular circumstances and the nature of the relief sought.

The above three last-mentioned maxims may be classed together as illustrating the general principle of equity that "nothing can call forth this Court into activity but conscience, good faith and reasonable diligence." (*Smith* v. *Clay*, 3 Bro. C. C. 460, n., per Lord Camden.)

10. Equality is Equity; or, as it is sometimes ex-

pressed, equity delighteth in equality. The commonest instance of this is the disfavour with which equity always regards a joint tenancy. But the maxim is variously applied; as, for example, in cases of contribution between joint contractors, co-sureties and others, in the case of abatement of legacies, in cases of apportionment, and especially in cases of marshalling of assets.

11. Equity looks to the Intent rather than the Form.—This is well illustrated in the way in which equity has always regarded mortgages as mere securities. Thus a conveyance, though absolute in its terms, if shown to be intended as a security, will be treated as a mortgage and be redeemable as such.

12. Equity acts in personam.—This is a maxim of procedure rather than of principle. But it is of great importance as giving the Court jurisdiction in cases relating to land outside the jurisdiction of the Court. In such cases the Court cannot issue execution *in rem*, but it can and does enforce its judgment by process *in personam*, *e.g.*, by attachment of the person within the jurisdiction, or sequestration of his goods within the jurisdiction, until the defendant complies with the judgment. So the Court will make an order for an account of rents, for specific performance, for foreclosure, &c. of land abroad, provided the title to the land is not itself in question. (*Penn* v. *Lord Baltimore*, 1 Wh. & Tu. 755.)

CHAPTER III.

ACCIDENT.

ACCIDENT, as remediable in equity, may be defined as an unforeseen and injurious occurrence which is not attributable to mistake, neglect or misconduct.

There are, however, many cases of accident in which due relief could always be obtained at law, and there equity would not interpose.

But where there was no adequate remedy at law, relief was always granted by a court of equity. And although courts of law have now, under the Judicature Acts, the remedial powers of courts of equity, yet the latter have not lost their original jurisdiction.

Accordingly, the cases in which relief against accident will be given in equity are cases of

(1.) Lost or suppressed documents.
(2.) Imperfect execution of powers.
(3.) Erroneous payments.

In the case of lost documents, whether deeds, bonds or negotiable instruments, courts of equity originally granted relief in the case of deeds, on the ground of discovery being required, or in the case of bonds on account of the want of profert, and in the case of negotiable instruments because of an indemnity being required. But none of these reasons for seeking the aid of equity now exist, since courts of law can now give discovery, dispense with a profert and impose an

indemnity. The fact, however, that courts of law can now give relief in such cases has not taken away the original jurisdiction of the courts of equity, which now consequently have concurrent jurisdiction.

It may be added, that courts of equity have never acquired jurisdiction to give relief in the case of *destroyed* instruments, because there was a complete remedy in such cases at law. (*Wright* v. *Maidstone*, 1 K. & I. 708.)

With regard to erroneous payments, executors often pay debts or legacies in full, when there is a deficiency of assets, and in these cases executors, if they have acted in good faith and with due caution, will be entitled to relief. (*Edwards* v. *Freeman*, 2 P. Wms. 447; but see *Hilliard* v. *Fulford*, 4 C. D. 389.)

So the reduction, by Act of Parliament, of public stock set aside to answer an annuity is an accident against the liability for which equity will relieve the executor. (*May* v. *Bennett*, 1 Russ. 370.)

In the absence of any countervailing equity, relief will be granted by a court of equity in the case of a defective execution of a mere power where it is created by an ordinary assurance, and where the defect is not of the very essence of the power, but such relief will only be given in favour of certain persons, viz.: a purchaser, a creditor, a wife, an intended husband, a legitimate child, or a charity. (Story, § 95; *Tollet* v. *Tollet*, 2 Wh. & Tu. 289.) And the mere manifestation of an intention to execute the power, provided it is sufficiently declared, will be deemed a defective execution of the power. (*Shannon* v. *Bradstreet*, 1 S. & L. 63; *Garth* v. *Townsend*, 7 Eq. 220.)

But equity will not interpose in the case of a *non-execution* of a mere power; for that would be depriving

the donee of the right of discretion in regard to its execution, except, however, in two cases, viz.: (1) where the execution has been prevented by fraud, and (2) where the power is in the nature of, or coupled with, a trust.

But equity will not give relief in matters of positive contract. Thus, where a lessee covenants to pay rent or repair the premises, he will be bound to do so, notwithstanding the destruction of the premises by inevitable accident, as by fire or tempest. (*Leeds* v. *Cheetham*, 1 Sim. 150; *Mellers* v. *Devonshire*, 16 Beav. 252.)

Nor will relief be granted where the accident arose from the gross neglect or fault of the party seeking relief, or his agents. (*Ex parte Greenaway*, 6 Ves. 812.)

Nor will relief be granted in favour of a person whose equitable right is not greater than that of the person against whom relief is sought, as in the case of a purchaser for value without notice. (*Malden* v. *Merrill*, 2 Atk. 8.) So no relief will be granted to legatees or devisees under a will defectively executed as against the heir or next of kin. (*Whitton* v. *Russel*, 1 Atk. 448.)

CHAPTER IV.

MISTAKE.

MISTAKE is sometimes the result of accident, but as contra-distinguished from it, and as remediable in equity, it is some unintentional act or omission or error arising from ignorance, surprise, imposition or misplaced confidence. (St. § 110.) Mistakes are of two kinds: mistakes of law and mistakes of fact.

Mistake of Law.—It is a well-known maxim that ignorance of law is no excuse: *Ignorantia legis neminem excusat.* But the maxim properly speaking only applies to the general law of the land, and not therefore to ignorance of a private *jus* or right. (*Cooper* v. *Phibbs*, L. R., 2 H. L. 149.) This exception is, however, more apparent than real, for a mistake as to one's rights (*jus*) is generally a mistake of fact, or a mistake of fact and law. And the Court apparently assumes that it is a mistake of fact until it is proved to be a mistake of law. (Brett's L. C, 83.) The exception, therefore, can scarcely be said to be an exception at all; for apparently no relief will be given where the mistake as to one's rights is a mistake as to law, as, for instance, in the case of mistake in the construction of a written instrument (*infra*).

It has been said, however, that if parties contract under a *mutual* mistake as to their relative and respec-

tive rights, the agreement may be set aside. (*Cooper* v. *Phibbs*, *supra*, per Lord Westbury; *Allcard* v. *Walker*, (1896) 2 Ch. 269.) But this may be doubted as a general proposition, apart from surprise, and at least it is not true where there has been any acquiescence amounting to estoppel. (*Re Hulkes*, 33 C. D. 552; and see *Mohan* v. *Broughton*, (1899) P. 211.)

Still less will the Court interfere where there has been a *payment* by mistake; for in the case of a payment made under a mistake of law, the Court will not interfere unless there is some equitable ground which renders it inequitable that the party should retain the money. (*Rogers* v. *Ingham*, 3 C. D. 351.) There are, however, three exceptions, or rather three grounds, for repayment, namely (1) where the parties are in a fiduciary position, (2) where there is fraud or undue influence, (3) where the payment is made to an officer of the Court as to a trustee in bankruptcy. (Brett's L. C. 82; *Ex parte Simmonds*, 16 Q. B. D. 308; *Re Rhoades*, (1899) 2 Q. B. 347.)

The result seems to be this—that a mere naked mistake of law, apart from some other equity, is never a ground for relief in equity except in the single case of a payment to an officer of the Court. (St. § 138.)

A mistake in the construction of an instrument is a mistake of law so far as the question of relief is concerned. (*Midland Rail.* v. *Johnson*, 6 H. L. C. 798, 811; *Rogers* v. *Ingham*, *supra*.)

A mistake as to foreign law is a mistake of fact. (*Leslie* v. *Baillie*, 2 Y. & C. 91.)

It may be stated, therefore, as a general proposition, that no relief will be granted against a naked mistake of law except in the single instance above given. Wherever relief has been given in such cases, the

mistake of law was not the foundation of the relief, but the relief was given in respect of some superadded equity, such as undue influence, imposition, mental imbecility, surprise or confidence abused. Thus, to give a well-known instance, if through ignorance of the common rules of descent an eldest son and heir is induced, under the name of a compromise, to divide his indisputable property with his brother, the Court will grant relief. Here the law is so plain, and the ignorance or mistake so glaring, as to give rise to a presumption that there must have been some undue influence, imposition or imbecility calling for the interference of the Court. (St. § 122; *Ramsden* v. *Hylton*, 2 Ves. 304.)

A good illustration of the difference between a mistake of law and fact is seen in the case of a compromise. A compromise of a doubtful point of law, if fairly entered into with due deliberation, will be upheld (St. § 121); but a compromise as regards facts can only be supported if there has been full disclosure. (*De Cordova* v. *De Cordova*, 4 A. C. 692.)

A compromise, however, though generally regarded as raising a question of mistake, does not, strictly speaking, do so; for in a compromise the parties abate their claims instead of asserting them in equity. But a compromise, like any other contract, can be set aside on grounds of mistake. (*Hickman* v. *Berens*, (1895) 2 Ch. 638.)

Mistake of Fact.—Generally speaking, equity will give relief in cases of mistake or ignorance of a material fact (St. § 140), and even where a person has forgotten the facts. (*King* v. *Stewart*, 66 L. T. 339.)

But relief will only be granted where the mistake is material—an obvious qualification—for, if immaterial,

there can be no ground for coming to the Court. If, however, the mistake is material, as where a person buys a house which is non-existent or which is already the purchaser's own property, relief will be given, whether the mistake is of one or of both parties, and even though the Court may itself have sanctioned the agreement. (*Huddersfield Bank* v. *Lister*, (1895) 2 Ch. 273; *Allcard* v. *Walker*, (1896) 2 Ch. 269.)

Further, the fact must not only be material but must in general be one which could not by reasonable diligence have been ascertained by the party seeking relief; for to grant relief in such cases would be to encourage culpable negligence on the part of persons bound to make due inquiries. (St. § 146.)

Nor will relief be granted where one party withholds a material fact, unless he was under a legal or equitable obligation to communicate it. (St. § 148; *Turner* v. *Green*, (1895) 2 Ch. 205.)

Nor where the means of information are open to both parties, and each is presumed to exercise his own skill and judgment in regard to all extrinsic circumstances. (St. § 149.)

In short, there must always be shown either th mistake of both parties, or the mistake of one, wit fraudulent concealment on the part of the other, justify the Court in reforming a contract. (St. § 14

Where the mistake is mutual the remedy is rectif tion, but where it is unilateral the remedy is rescis (*Wilding* v. *Sanderson*, (1897) 2 Ch. 514.) A n mistake may, however, be only ground for com tion. (*Bettyes* v. *Maynard*, 49 L. T. 389.)

But in all cases of mistake the party seeking must stand upon some equity superior to that defendant, for where the equities are equal the

will not interfere. Therefore it will not give relief against a *bonâ fide* purchaser for valuable consideration (St. § 139), nor will it aid a volunteer, except perhaps in the case of a defective execution of a power. (St. § 176.)

Notwithstanding the rule against the admission of parol evidence to vary or control written agreements, such evidence is admissible to prove a mistake in equity, the Court wisely deeming such cases to be a proper exception to the rule, and proving its general soundness. (St. § 154; *Olley* v. *Fisher*, 34 C. D. 367.)

But parol evidence is not admissible to prove a mistake in a will (St. § 179), and it is moreover doubtful whether the Chancery Division will now exercise any jurisdiction to rectify mistakes in wills. (*Meluish* v. *Milton*, 3 C. D. 27.)

CHAPTER V.

ACTUAL FRAUD.

THE modes of fraud are infinite, and courts of equity have very wisely never laid down as a general proposition what constitutes fraud, or any general rule beyond which they will not go in granting relief on the ground of fraud, lest other means of evading the equity of the Court should be found.

Though fraud has always been cognisable at common law, there always were and still are many cases in which fraud is practically irremediable at law, and over these courts of equity exercise an exclusive jurisdiction. Moreover, although fraud is not to be presumed, courts of equity will hold fraud established by presumptive evidence which would not be sufficient in a Court of law, though, strictly speaking, nothing is or can be evidence in equity which is not also evidence at law. (*Re Terry and White*, 32 C. D. 14.)

There are two principal kinds of fraud—actual fraud and constructive fraud.

Actual Fraud.—Where a party misrepresents a material fact in order to mislead, cheat, entrap or obtain an undue advantage from another, there is an *actual* fraud. And the misrepresentation may be as well by deeds or acts as by words, by artifices to mislead as by positive assertions. (St. § 192; *Smith*

Land, &c., 28 C. D. 7; *Edgington* v. *Fitzmaurice*, 29 C. D. 459.)

It is not necessary to constitute actual fraud that the party making the representation knew it to be false (*Lagunas Co.* v. *Lagunas Syn.*, (1899) 2 Ch. 392); it is sufficient if he made it not knowing or caring whether it was true or false. But an innocent misrepresentation made by mistake is not a fraud, and a negligent as distinguished from a fraudulent misrepresentation is not actionable; for there can be no fraud where a false statement is made with an honest belief in its truth. (*Derry* v. *Peek*, 14 A. C. 337; *Angus* v. *Clifford*, (1891) 2 Ch. 449, 464; *Tomkinson* v. *Balkis Cons. Co.*, (1891) 2 Q. B. 614; *Lagunas Co.* v. *Lagunas Syn.*, (1899) 2 Ch. 392.)

The result of the cases, which are not very clear, may perhaps be stated thus: to make a statement careless whether it be true or false, and therefore without any real belief in its truth, is a fraud; to make through want of care a false statement, which nevertheless is honestly believed in, is not fraud.

Of Two Kinds.—Actual frauds are of two kinds: I. Frauds arising irrespective of the position of the injured party: II. Frauds arising chiefly from a consideration of the peculiar position or condition of the injured party.

I. Fraud irrespective of position of Parties.—One of the largest classes of cases in which courts of equity accustomed to grant relief is where there has been a epresentation or *suggestio falsi*. It should, however, remembered that all misrepresentation is not fraud, ma that misrepresentation may be relieved against on

other grounds, *e.g.*, mistake (*ante*, p. 19) or specific performance (*post*, Chap. XIX.).

Suggestio Falsi.—Generally speaking, everyone is held responsible (1) for the consequences of a false representation made by him to another on which that other acts and is damnified. (*Barry* v. *Croskey*, 2 J. & H. 1.) (2) For a false representation upon which a third person acts and is damnified, provided that such representation was made with the direct intent that it should be acted on by such third person in the manner that occasions the injury. (*Ib.*) (3) But the injury in the second case must be the immediate and not remote consequence of the representation so made. (*Ib.*)

The misrepresentation which is to justify the rescission of the contract must be the misrepresentation of a material fact which has induced the contract (*Pulsford* v. *Richards*, 17 Beav. 96; *Gordon* v. *Street*, 48 W. R. 158); and a person who assists in the fraud which induced the contract is also liable for the loss and damage so caused. (*Marnham* v. *Weaver*, 80 L. T. 412; *Marsh* v. *Joseph*, (1897) 1 Ch. 213.)

Again, the misrepresentation must (at least in cases of vendor and purchaser) be something more than mere puffing, for that of course does not constitute fraud—*simplex commendatio non obligat.* And where each party must be taken to rely upon his own judgment, there is, generally speaking, no fraud, though under exceptional circumstances even mere commendation may become a material element of fraud. (*Smith* v. *Land, &c.*, 28 C. D. 7.)

Further, if a person is not misled he cannot complain; but it is not enough that he had the means of knowledge within his reach (*Redgrave* v. *Hurd*, 20 C. D. 1);

and if the misrepresentation is ambiguous, it is on him to prove that he was misled thereby. (*Smith* v. *Chadwick*, 9 A. C. 187.)

Suppressio Veri.—With regard to concealment or *suppressio veri*, very much the same principles apply. But in such cases the concealment must be of a fact which the party was under a legal obligation to disclose; and where there is no such obligation mere silence, however material the fact, will not be sufficient to set the transaction aside. (*Turner* v. *Green*, (1895) 2 Ch. 206.)

And, generally speaking, there is no legal obligation on a purchaser to make disclosure to a vendor, as in the well-known instance of a man buying an estate in which he knows there to be a mine of which the vendor is ignorant. (*Fox* v. *Mackreth*, 1 Wh. & Tu. 141; cf. *Boswell* v. *Coaks*, 11 A. C. 232.) And, on the other hand, although a vendor is under certain well recognised duties towards the purchaser, and will be guilty of fraud if he sells without a title, or conceals incumbrances (*Marnham* v. *Weaver*, 80 L. T. 412), yet in many cases, and especially in the case of sale of personal chattels, the maxim *caveat emptor* applies, and the purchaser is bound by the sale notwithstanding intrinsic defects regarding which the vendor has simply held his tongue —*Nam qui tacet non videtur affirmare.* (*Walker* v. *Symonds*, 3 Swanst. 62.)

There are cases, however, where, from the very nature of the transaction, the mere silence of the party is naturally and properly deemed to amount to a direct affirmation. Thus, in cases of insurance, where the facts material to the risk are generally within the knowledge of the insured only, who is bound to communicate

them, if they are withheld, whether by design or accident, it is fatal to the contract. (*London Ass.* v. *Mansel*, 11 C. D. 363; *Thomson* v. *Weems*, 9 A. C. 671.)

Mere inadequacy of price or other inequality in a bargain does not *per se* constitute a ground for setting aside the bargain in equity. (*Harrison* v. *Guest*, 6 D. M. & G. 424.) But the inadequacy may be so gross or bargain so unconscionable as to be strong evidence of fraud, and in such a case the transaction will be set aside if the party had no competent and independent advice. (*Rees* v. *De Bernhardy*, (1896) 2 Ch. 437.)

A fraudulent contract is, generally speaking, voidable and not void, and is therefore valid until avoided. It is a general rule that courts of equity will not set aside a voidable contract if the parties can no longer be placed *in statu quo;* and rescission may become impossible if the rights of third parties have intervened (*Lagunas Co.* v. *Lagunas Syn.*, (1899) 2 Ch. 392, per Lindley, M. R.), for instance, a fraudulent contract to take shares cannot be rescinded after a winding-up, since the rights of the general creditors would be affected. (*Cavendish-Bentinck* v. *Fenn*, 12 A. C. 652.)

II. **Fraud arising from Position of the Parties.**—As regards actual frauds arising chiefly from the position or condition of the injured party:—

(1.) And first, as regards fraud arising from the relative *positions* of the parties. We have already seen in the case of insurance, that where a person is bound to make disclosure and conceals material facts, the transaction will be set aside on the ground of fraudulent concealment. This principle also applies to releases and family arrangements. (St. § 217). But by far the most comprehensive class of cases of undue conceal-

ment arises from some peculiar relation or fiduciary character between the parties. Among this class are to be found those arising from the relation of trustee and *cestui que trust*, solicitor and client, principal and agent or surety, parent and child, guardian and ward and others. In these and the like cases, the law in order to prevent undue advantage being taken of the relation requires the utmost good faith—*uberrima fides*—in all transactions between the parties, and the onus of proving the perfect fairness of the transaction rests upon the person who enters into it with a person placing confidence in him. (St. § 311.) This principle does not, however, apply to the relation of husband and wife. (*Barron* v. *Willis*, 68 L. J. Ch. 604).

The above cases of fraud are often treated as cases of constructive fraud, but it is submitted that they fall more properly under the head of actual fraud, for if there is undue concealment or influence there is actual fraud, and if there is neither and the transaction is perfectly fair there is no fraud at all, except perhaps in the case of a purchase by a trustee.

(2.) With regard to frauds arising from the *condition* of the injured party, it is upon this ground that contracts and other acts of idiots, lunatics, and other persons *non compotis mentis* are set aside. The courts of equity watch with the most jealous care every attempt to deal with such persons; and whenever there is not entire good faith, or the contract is not for the benefit of those persons, courts of equity will set it aside or make it subservient to their just rights and interests. (St. § 228.)

With regard to drunkenness, the case is stated to be somewhat different. It is only a ground for relief when so excessive as to deprive the person of his reason and

understanding. If there be not that degree of drunkenness, the Courts will not interfere unless there has been some unfair advantage taken, or some fraudulent contrivance or imposition practised. (St. § 231; *Clarkson* v. *Kitson*, 4 Gr. 244.) It is somewhat difficult to see the distinction between this and the preceding cases, but the distinction, though nowhere stated, is probably this, that the onus, in the case of drunkenness, is shifted on to the person injured.

Closely allied to the foregoing are cases where the person, though not insane or imbecile, is yet of such great weakness of mind as to be exposed to imposition. And it is immaterial from what cause that weakness arises, whether it arise from infancy or old age, illness, necessity or overwhelming calamity (St. § 234), for the principle extends to every case in which the person injured was in a position or condition to be easily imposed upon. (St. § 234; *Lyon* v. *Home*, 6 Eq. 655; *Corbett* v. *Brock*, 20 Beav. 524.) And there are cases of an analogous nature where the party is subjected to undue influence, although of competent understanding, as where he acts under duress, or extreme terror, or threats, or apprehension short of duress. For in cases of this sort he has no free will, but stands *in vinculis*. And the constant rule in equity is, that where a party is not a free agent nor equal to protecting himself, the Court will protect him (St. § 239; *Hawes* v. *Wyatt*, 3 B. C. C. 158), provided in all cases that he has not slumbered over his rights, and that the parties can be placed *in statu quo*. (*Allcard* v. *Skinner*, 36 C. D. 145; St. § 228.)

It should be noticed that in some cases contracts are not merely voidable on the ground of fraud, but are

absolutely void, as in the case of lunatics and infants (*post*, Chap. XXII.), and cannot be confirmed.

It is obvious that the above principle with regard to fiduciary relation will cease to exist as soon as the relation ceases to exist, but this is only true when the relationship has entirely ceased, not only in name, but in fact, and the parties are at arm's length; for the principle continues to apply for so long after the relation has ceased, as the reasons on which it is founded continue to operate (*Carter* v. *Palmer*, 8 Cl. & F. 657; *Hobday* v. *Peters*, 28 Beav, 349). Thus, the principle applies to transactions by an infant shortly after coming of age. (*De Witte* v. *Addison*, 80 L. T. 207.)

It has already been stated that relief against fraud will only be given where the parties can be put *in statu quo*, and the rights of third parties do not intervene. Where this is the case, there is an important corollary to the above principle in the rule, that where one of two innocent parties must suffer by the fraud of a third person, that one must be the sufferer who, however innocently, has put it in the power of the third person to commit the fraud. (*Hunter* v. *Walters*, 7 Ch. 75.) Thus, if a plaintiff execute a mortgage to his solicitor, believing it to be a merely formal document, and the solicitor fraudulently raises money upon it, the plaintiff and not the lender must bear the loss. (*French* v. *Hope*, 56 L. J. Ch. 363.)

CHAPTER VI.

CONSTRUCTIVE FRAUD.

HAVING thus briefly considered actual or meditated or intentional fraud, we will now pass to legal or constructive frauds. By constructive frauds are meant such acts or contracts as, although not originating in any evil design, are yet, by their tendency to deceive or violate confidence or injure public interests, deemed equally reprehensible with positive fraud, and are therefore prohibited as within the same reason and mischief. (St. § 258.)

The foundation of the jurisdiction in such cases is the wise desire of the Court to apply preventive justice so as to shut out the inducements which lead to a wrong, rather than apply remedial justice when the wrong has been done.

Constructive frauds are usually divided into three classes :—(1.) those arising from some fiduciary or confidential relation; (2) those against public policy; (3) mixed and miscellaneous cases which operate as a virtual fraud.

I. Fraud arising from Relation of Parties.—We have already stated that in our opinion the first class falls more properly under the head of actual frauds (*ante*, p. 26). Take for instance a typical case of a gift to a

father from a child who is still under the father's control, there the onus is on the father to show that the child had independent advice, that he knew all the facts, and that he intended to confer the benefit. If the father cannot prove these things the gift will be set aside (St. § 309), and according to most text writers on the ground of constructive fraud. But if the father cannot prove these points—if the child had no advice, did not know the facts, nor intended to confer the benefit—it would seem to be a clear case of *actual*, and not merely constructive, fraud.

There are, however, cases in which transactions are set aside on the ground of fiduciary relation which are not cases of actual fraud; but these are not, strictly speaking, cases of fraud at all. The principle upon which the Court acts in such cases is not relief against fraud, but the prevention of fraud. The transaction is set aside, irrespective of fraud or undue influence, on the principle of guarding against the risk of abuse of the fiduciary position, and of removing the person in that position from temptation. The principle is that a person in a fiduciary position is bound not to do anything which can place him in a position inconsistent with the interests of his trust, or which has a tendency to interfere with his duty. The principle and the cases illustrating it are important, as for instance the case of a trustee purchasing trust property from himself. Here there is no question of undue influence, and the *cestui que trust* can set aside the purchase however *bonâ fide* and innocent it may be, quite irrespective of fraud and whether the trustee has made any advantage or not. (St. § 322; Lewin, 10th ed. 551.)

It is difficult, therefore, in many cases to distinguish cases of actual and constructive fraud. Indeed they

are often both to be found in the same transaction, and any attempt to further distinguish them would be a task of little utility, and would only tend to perplex the student.

II. **Frauds against Public Policy.**—As instances of constructive frauds so denominated as being contrary to public policy may be mentioned :—

1. Marriage brokage contracts by which a person engages to give another some remuneration or reward if he will negotiate an advantageous marriage for him. Such contracts are utterly void and incapable of confirmation, and money paid under them may be recovered back in equity. (St. § 263 ; *Smith* v. *Brunning*, 2 Vern. 392.)

2. On the same principle every contract by which a parent or guardian obtains any remuneration or reward for promoting or consenting to the marriage of his child or ward is void. (St. § 266 ; *Kent* v. *Allen*, 2 Vern. 588.)

3. Of a kindred nature and governed by the same rules are all agreements made as a reward for using influence over another person to induce him to make a will in a person's favour. (*Debenham* v. *Ox*, 1 Ves. 276.) But such cases must be carefully distinguished from those where there is an agreement between relatives to share the estate equally whatever be the effect of the will, for such an agreement is valid where no restriction is imposed upon the devisee. (St. § 265 ; *Higgins* v. *Hill*, 56 L. T. 426.)

4. Equally void and on the same ground are all contracts made in violation or derogation of the treaty of marriage, as where by secret agreement an intended wife's portion is made to appear more than it really is

(*Gale* v. *Lindo*, 1 Vern. 475; and see *Re Great Berlin Co.*, 26 C. D. 616), and in this class also fell those cases of fraud upon the marital right which were formerly of considerable importance (*Strathmore* v. *Bowes*, 1 Wh. & Tu. 613), but which have now been rendered obsolete by the Married Women's Property Act. (*Post*, Chap. XXIII.)

5. It is upon the same ground of public policy that contracts or conditions in restraint of marriage are held void. If, however, they are reasonable in themselves and do not operate as an undue restraint, they are good. (*Re Nourse*, (1899) 1 Ch. 63.) But if they are in general restraint of marriage, or of so rigid a nature that they unreasonably restrain the choice of marriage, they are void. (St. § 280.) But a condition in restraint of a second marriage though general is good, and whether it be in restraint of a man or woman. (*Allen* v. *Jackson*, 1 C. D. 399.)

6. So also contracts in *general* restraint of trade are void on the same ground. (*Davies* v. *Davies*, 36 C. D. 359.) But if the restraint is no wider than is reasonably necessary for the protection of the covenantee, and is not injurious to public interests, it will be good though unlimited as to space, if founded on a valuable consideration. (*Maxim-Nordenfelt Co.* v. *Nordenfelt*, (1894) A. C. 535, 565; *Underwood* v. *Barker*, (1899) 1 Ch. 300.) And a person may lawfully sell a secret in his trade or business and restrain himself from using that secret. (*Benwell* v. *Inns*, 24 Beav. 307.) Further, the Court will, where possible, sever what is reasonable from what is unreasonable and hold the restraint good so far as it is reasonable. (*Haynes* v. *Doman*, (1899) 2 Ch. 13.)

7. Also all agreements made in violation of a public

trust or tending to interfere with the administration of justice (*Lound* v. *Grimwade*, 39 C. D. 605) are held void, *e.g.*, contracts for the buying, selling or procuring of public offices (*Chesterfield* v. *Janssen*, 1 Wh. & Tu. 289), contracts in the nature of champerty (*Rees* v. *De Bernhardy*, (1896) 2 Ch. 437). And generally all agreements founded on a corrupt or immoral consideration are treated as frauds upon public policy or public law.

Generally speaking, courts of equity will not interfere in the case of fraudulent agreements where both parties are participators in the fraud, acting upon the well-known maxim: *In pari delicto potior est conditio possidentis.* But where the agreement is against public policy, the fact that the party is *particeps criminis* is not material, since the relief is given not for the benefit of the party, but for the benefit of the public, though the party may indirectly benefit thereby. (*Roberts* v. *R.*, 3 P. Wms. 66.)

III. **Cases of virtual Fraud.**—With regard to the third group of constructive frauds which fall within neither of the preceding ones, but which, nevertheless, operate substantially as frauds on the parties themselves, or on third persons, may be instanced the following:—

1. Those cases where the Statute of Frauds, which was designed as a protection *against* fraud, is sought to be made a protection *for* fraud, or in other words is made an engine of fraud. Hence, in a variety of cases where, by fraud, imposition or mistake, a contract which ought to have been reduced into writing has not been so reduced, courts of equity will enforce it, notwithstanding the statute, against the party, guilty of a breach of confidence, who attempts to shelter himself

behind the statute. Thus it is a fraud on the part of a person to whom land is conveyed on trust, to deny the trust and claim the land, and it is competent for the person so conveying to prove the trust by parol evidence. (*Rochefoucauld* v. *Boustead*, (1897) 1 Ch. 196.)

2. Equity also interferes in the case of common sailors, who are supposed to be so extremely generous, improvident and credulous as to be specially liable to be imposed upon. Hence contracts of seamen, respecting wages and prize-money, are viewed with great jealousy, and are generally relievable where any undue advantage has been taken. (St. § 332.) The principle of relief in these cases, however, seems to be the same as that in the case of expectant heirs.

3. Relief is also granted in what are called catching bargains with heirs, reversioners and expectants during the life of their parents or other ancestors. In many of these cases there is actual fraud, but in all cases the transaction will be set aside unless it can be shown to be fair, just and reasonable. And this is still so notwithstanding the Sales of Reversions Act (31 & 32 Vict. c. 4), which enacts that such transactions shall not be set aside merely on the ground of undervalue. The Act does not, however, affect the jurisdiction of the Courts to set aside such transactions wherever there is fraud or unfair dealing, and inadequacy of price may still be evidence of fraud. Nor does the Act in any degree alter the *onus probandi* in such cases. (*Aylesford* v. *Morris*, 8 Ch. 484, 490.)

The principle also applies where the expectant has no property of his own and no expectation of any, except such general expectations as are founded on his father's position in life. (*Nevill* v. *Snelling*, 15 C. D. 579.) It also applies even where the property is in possession in

the case of a poor and ignorant person acting without independent advice. (*Fry* v. *Lane*, 40 C. D. 312, 322; *Jones* v. *Kerr*, *ib.*, 449.)

4. Upon similar principles also *post obit* bonds and other securities of a like nature are set aside when made by heirs and expectants. A *post obit* bond is an agreement on the receipt of money by the obligor to pay a larger sum upon the death of a person from whom he (the obligor) has expectations. (St. § 342.)

The doctrine with regard to expectant heirs was said to be subject to two qualifications, viz., that the parent or other ancestor was ignorant of the transaction, and that the transaction was entered into under pressure of necessity. These two propositions are perfectly clear, and the reason there are so few decisions on them is because they are apparently always assumed and never questioned. (*King* v. *Hamlet*, 2 M. & K. 473.) It is, however, truer to say that the two characteristics always to be found in such cases are weakness (which may be due to necessity) on the one side, and advantage taken of that weakness on the other. (*Aylesford* v. *Morris*, 8 Ch. 489.)

And this is borne out as regards the pressure of necessity by the fact that when the pressure has ceased, and the party, upon full information adopts and confirms the contract, it will be binding. (*Jacques-Cartier* v. *Montreal Bank*, 13 A. C. 111.) But this can only be where the transaction is voidable and not void. Thus, if the expectant be an infant, his contracts are void under the Infants Relief Act, 1874, and cannot be confirmed.

5. Other cases of constructive fraud are where a person knowingly produces a false impression on another, who is thereby drawn into some act injurious

to himself. Many of these are cases of actual fraud; but many of them are cases of constructive fraud, and these are for the most part cases of equitable estoppel. If, therefore, a man having a title to an estate which is offered for sale, stands by and does not forbid it, and thereby another person is induced to purchase it, the party so standing by will be bound by the sale: *Qui tacet consentire videtur; qui potest et debet vetare, jubet, si non vetat.* So, if a person allow another innocently to lay out money on the former's estate without giving him notice, he will not be allowed to assert his title without fully indemnifying him for all his expenditure. (*Cawdor* v. *Lewis*, 1 Y. & C. 427; *Wilmott* v. *Barber*, 15 C. D. 96.) So a company will be estopped from denying that shares are fully paid up if they have issued certificates to that effect. (*Re Veuve Monnier*, 1896, 2 Ch. 525.) And in cases of this sort, neither infancy nor coverture will constitute any excuse for the party guilty of the concealment, for neither infants nor any other persons are privileged to practise deception. (St. § 385.)

And just as a person cannot derogate from his own grant, so he cannot derogate from a state of things which he has held out as an inducement to another to enter into a contract. Thus, if a person represent to a purchaser or lessee that he (the vendor) cannot obstruct a view, or that he will keep the estate as a residential property, he will be restrained from acting in violation of the representation so made. (*Piggott* v. *Straton*, 1 D. F. & J. 33; *Mackensie* v. *Childers*, 43 C. D. 265; *Hudson* v. *Cripps*, 1896, 1 Ch. 265.)

6. Formerly agreements whereby parties agreed not to bid against each other at a public auction were thought to be void on the ground of constructive fraud (Sugd. V. & P., 14th ed. 118), though they are not so

now. (*Re Carew*, 26 Beav. 187.) But by the Sale of Land by Auction Act, 1867 (30 & 31 Vict. c. 38), a right to bid must be reserved by the vendor in the conditions of sale. And a similar provision as to goods is contained in the Sale of Goods Act, 1893, s. 58.

7. Generally speaking, every gift to a person in a fiduciary position, as from beneficiary to trustee, client to solicitor, or infant to parent or guardian, is fraudulent and voidable if there is any undue influence, unless the donor has full information and is a perfectly free agent. Also every secret profit, whether bribe, bonus, or gift, made to a person in a fiduciary position, as agent, director, promoter, &c., must be accounted for to his principal. Also a gift is fraudulent as against creditors under 13 Eliz. c. 5. And *à fortiori* a clandestine gift to one creditor in fraud of the others is utterly void, even against the debtor himself, who may recover it back. (*Mare* v. *Sandford*, 1 Giff. 288.)

8. A power of appointment must be exercised *bonâ fide* for the end designed, otherwise it is void. (*Aleyn* v. *Belchier*, 2 Wh. & Tu. 308.) This principle has been somewhat modified by legislation, but subject to that legislation it is still true. By the Illusory Appointments Act (1 Will. IV. c. 46) it was enacted that no appointment should be invalid on the ground merely that a nominal or illusory share of the property had been appointed to an object of the power. And by the Powers Amendment Act, 1874 (37 & 38 Vict. c. 37), the appointor need not now appoint any share at all to a particular appointee unless the power itself expressly directs that no object of the power is to receive less than some specified amount. An appointment, therefore, is no longer bad because it is not made in favour of all the objects of the power; but subject to this the

old doctrine still holds good, that an appointment not made *bonâ fide* for the end designed is fraudulent and void. Thus, if a parent, having a power of appointment among his children, appoints to one or more of them upon a bargain for his own advantage, equity will relieve against the appointment—as *e. g.*, where there is a secret understanding that the child shall assign a part of the fund to a stranger or to the father's creditors. (*Daubeny* v. *Cockburn*, 1 Mer. 626; *Carver* v. *Richards*, 1 D. F. & J. 548.) So if a parent, having a power to raise portions, appoints to a child during infancy and while not in want of a portion, and the death of the child is at the time expected, he will not be allowed, on the child's death under age, to derive any benefit from the appointment as representative of the child. (*Roach* v. *Trood*, 3 C. D. 429.)

When an appointment is void on the ground of fraud, if any part of it is free from fraud, and that part is severable, it will, as to that part, be valid notwithstanding the failure of the other part. (*De Hoghton* v. *De Hoghton*, 1896, 2 Ch. 385.)

And it is important here to notice that the doctrines applicable to the fraudulent appointments do not apply to the release of a power which is not coupled with a duty. The fact that a release of a limited power will result in a benefit to the donee of the power does not make it either fraudulent or void. Thus, where a tenant for life had an exclusive power to appoint to his daughter and her issue, and in default to the daughter absolutely, and the father, having released the power, induced his daughter to join in mortgaging the fund for his own purposes, the release was held valid. (*Re Somes*, 1896, 1 Ch. 250.)

CHAPTER VII.

EXPRESS TRUSTS.

Origin of Trusts.—The origin and history of trusts is more a matter of conveyancing and real property law than of equity jurisprudence. This, therefore, is all that need be stated here. Trusts date back to the time of *Tyrrell's Case* (Dyer, 155, Tud. L. C. R. P.), which decided that there could not be a use upon a use; and it was mainly this decision which gave rise to our modern doctrine of trusts. For upon this decision the Court of Chancery interfered and held that though the owner of the first use took the legal estate, yet he held it only for the benefit of the person who had the last use, in other words, he held it upon trust for the *cestui que use*.

This, however, only applies to real property and has no application to personalty. The Statute of Uses did not apply to personal estate; and as regards this latter species of property, it was always simply a question whether it had been by express terms or by necessary implication vested in one person for the benefit of another. If so, then there is a trust.

Statute of Frauds.—It may be well, before dealing with the different classes of trusts, to refer to the Statute of Frauds. That statute (sect. 7) provides that all

declarations or creations of trusts of any land shall be in writing signed by the person declaring the same, and (sect. 9) all grants and assignments of any trust shall likewise be in writing and signed by the party granting or assigning the same. But the statute (sect. 8) recognizes two exceptions, namely: (1) trusts arising or resulting from any conveyance of land by implication or construction of law; (2) trusts transferred or extinguished by operation of law. But pure personalty is not within the Act, that is, it is not within the 7th section, which treats of declarations of trust, though it is within the 9th section, which treats of the assignment of trusts.

A trust is a beneficial interest in, or beneficial ownership of, real or personal property, unattended with the legal ownership. (2 Sp. 875.)

Express and Implied Trusts.—Trusts may be classified under three heads, namely: express trusts, implied trusts and constructive trusts. And express trusts may be further divided into private trusts and charitable trusts.

This classification is convenient in dealing with the subject, but it is of little practical utility. Further, the line of demarcation between express and constructive trusts has not been drawn with any precision. (*Soar* v. *Ashwell*, (1893) 2 Q. B. 390, 401.) Again, a resulting trust, though an implied trust, is for some purposes at least an express trust (Lewin, 10th ed. 1069), and an express trust may be proved by parol. (*Rochefoucauld* v. *Boustead*, (1897) 1 Ch. 196.)

An express trust may be described as a trust which is clearly expressed or clearly intended. (*Miles* v. *Harford*, 12 C. D. 691, 699.) It need not be in writing,

but may be proved by parol evidence. (Lewin, 10th ed. 1069; *Rochefoucauld* v. *Boustead*, *supra*).

Trusts: Executed and Executory.—Express trusts may be either executed or executory.

A trust is executed when it is fully and finally declared by the instrument creating it, that is, where the limitations are complete and final, or, as is sometimes said, where the settlor is his own conveyancer. If there is nothing to do but to take the limitations and convert them into legal estates, then the trust is executed. (*Egerton* v. *Brownlow*, 4 H. L. C. 210.)

On the other hand, an executory trust lies in intention—an intention not merely implied but expressed, though not fully and completely expressed. Where a testator, instead of expressly stating what he means, instead of putting into words the precise nature of the limitations, says in effect, there are my intentions, do your best to carry them out, then the trust is executory. (*Miles* v. *Harford*, *supra*.) Here, then, we have an instance of an express trust which is not expressly stated but expressly intended.

The importance of the distinction between executed and executory trusts lies in the different way in which they are construed by courts of equity. In the case of executed trusts the Court puts the same construction on technical words as is put by a court of law on the limitations of legal estates. Thus, an estate given in trust for A. for life, with remainder in trust for the heirs of the body of A., will, according to the rule in *Shelley's Case*, which is a rule of law, be held to give A. an estate tail. On the other hand, in the case of executory trusts, the Court may or may not put the same construction on technical words as is put by courts of

law, but will, in completing the executory trust, mould it so as to accord with what it collects to be the real intention of the party; in other words, the Court subordinates the language to the intent. (*Sackville-West* v. *Holmesdale*, L. R. 4 H. L. 543.)

In construing executory trusts, therefore, the main thing is the intention of the testator or settlor. But in arriving at that intention, a material distinction is to be observed between a trust executory arising in marriage articles and one arising in wills; for in the former the Court has a clue to the intention from the very nature of the instrument, but in wills the Court knows nothing of the object in view *à priori*, but, in collecting the intention, must be guided solely by the language used in the will. So that, the design of marriage articles being to benefit the children of the marriage, a limitation to the husband and the heirs of his body will only be construed to give him a life estate; whereas the same words in a will by trust executory would give him an estate tail unless a contrary intention appeared in the will itself. (*Glenorchy* v. *Bosville*, 2 Wh. & Tu. 763.)

Voluntary Trusts.—Where there is a valuable consideration and a trust is intended, formalities are of minor importance, since if the transaction cannot take effect as a trust it can be enforced as a contract. But where there is no consideration, the trust will only be supported provided it was in the first instance perfectly created. (*Ellison* v. *Ellison*, 2 Wh. & Tu. 835.)

The question what constitutes a good voluntary trust raises the important question what is necessary to create a valid trust, in other words, when and how a trust is created. It is sometimes said that three things are

necessary essentials of every express trust, namely, the object must be certain, the subject must be certain and the intention must be certain. This is so obvious as to hardly need stating, for it is perfectly clear that there must be someone to benefit by the trust, there must be something to declare a trust of, and it is equally evident that there can be no express trust, where none is intended. (Lewin, 10th ed. 84.) All these things, however, may be present and yet there may be no trust. We propose, therefore, to consider very briefly what is necessary, in addition to the above essentials, to create a valid trust *inter vivos*.

A trust is not perfectly created when there is a mere intention of creating a trust or a voluntary agreement to do so, and the settlor himself contemplates some further act for the purpose of making it complete. (Lewin, 10th ed. 68.)

If the settlor proposes to convert himself into a trustee, then the trust is perfectly created as soon as the settlor has executed an express declaration of trust intended to be final and binding upon him, whether the property be legal or equitable, and whether capable or incapable of transfer. (*Ibid.*)

If the proposed trustee is a stranger and the subject of the trust is a legal interest and one capable of legal transfer, then the trust is not perfectly created unless the legal interest is actually vested in the trustee. (Lewin, 10th ed. 70.)

If the subject of the trust is not capable of legal transfer, then the case seems to come within the principle, applicable to all voluntary transfers, that if the settlor does all that he can and makes all the assignment that is possible, then a binding trust is created. (*Ib.* 71.)

Precatory Trusts.—With regard to the intention to create a trust, it is not necessary that technical words should be used. Words of recommendation, entreaty, request, hope or wish, such as "full confidence," "heartily beseech," "well know," "of course he will give," may amount to a trust, if it appears that a trust was intended. But the tendency of the courts is distinctly against the establishment of precatory or recommendatory trusts. Undoubtedly confidence, if the context shows that a trust was intended, may create a trust; but a mere confidence that a person will do a certain thing will not impose a trust. In short, the Court will not allow a precatory trust to be raised unless, on consideration of all the words employed, it comes to the conclusion that it was the intention to create a trust. Here, again, as so often happens in equity, the intent overrides the language. (*Adams and Kensington Vestry*, 27 C. D. 394; Brett's L. C. 19; *Re Hamilton*, (1895) 2 Ch. 370; *Re Williams*, (1897) 2 Ch. 12.)

Fraudulent Trusts.—A voluntary trust, though complete on the face of it, may be set aside in equity if obtained by undue influence (*ante*, p. 26), or if executed under a mistake (*ante*, p. 18).

By the Statute 13 Eliz. c. 5, all conveyances and gifts of land or goods are void against creditors unless made for valuable consideration, *bonâ fide* and without notice. The Act does not declare all voluntary trusts to be void, but only such as are fraudulent. A voluntary conveyance, however, is deemed to be fraudulent within the statute if it tend to defeat or delay creditors. It was at one time thought that the mere fact of the settlor being indebted at the time of the settlement was

sufficient to invalidate it. The true test, however, is whether the settlor has left sufficient property outside the settlement to pay his debts; if he has not, an intent to defeat his creditors will be presumed. (*Freeman* v. *Pope*, 5 Ch. 538; Brett's L. C. 54.) On the other hand, though the settlor was perfectly solvent, yet if he intended to withdraw the bulk of his property from the reach of his creditors in the event of insolvency, the settlement is void. (*Ex parte Russell*, 19 C. D. 588; *Re Ridler*, 22 C. D. 74.)

A voluntary settlement can be impeached, not only by creditors at the time of the settlement, but by *subsequent* creditors, if it can be proved that the settlor contemplated in fact a fraud upon such subsequent creditors (Lewin, 10th ed. 80), or if any debt incurred at the date of the deed remains unsatisfied. (*Freeman* v. *Pope*, *supra*.) And voluntary creditors have the same right in this respect as creditors for value. (*Adames* v. *Hallett*, 6 Eq. 468.)

A deed will be set aside against a purchaser *with* notice. Therefore a deed, though founded on a valuable consideration, even a consideration of marriage, will be void if made with intent to defraud creditors. (*Re Pennington*, 59 L. T. 774; aff. W. N. 1888, 205.)

The rule as to acquiescence and laches barring the remedy does not apply to these cases, since they arise on statute. (*Re Maddever*, 27 C. D. 523.)

Formerly a voluntary settlement of *land* was void under 27 Eliz. c. 4, as against a subsequent purchaser for valuable consideration, even though with notice; and though the grantor could not compel specific performance, the purchaser might do so. But now, by the Voluntary Conveyances Act, 1893 (except as regards purchasers before the Act), no voluntary conveyance

made *bonâ fide* and without any actual fraudulent intent shall be deemed fraudulent or void within the meaning of 27 Eliz. c. 4.

Even before the Voluntary Conveyances Act a very slight valuable consideration was sufficient to support a post-nuptial settlement. (*Hewison* v. *Negus*, 16 Beav. 594; *Shurmur* v. *Sedgwick*, 24 C. D. 597.) And, on the other hand, even an ante-nuptial settlement would be set aside as fraudulent as against a subsequent purchaser where the marriage was wholly illusory as a consideration and the wife was aware of the real character of the transaction. (*Colombine* v. *Penhall*, 1 Sm. & G. 228; *Bulmer* v. *Hunter*, 8 Eq. 46.) And this would, no doubt, still be the case, there being a fraudulent intent within the last-mentioned Act.

By the Bankruptcy Act, 1883, s. 47, any post-nuptial settlement made within two years of the subsequent bankruptcy of the settlor is, *ipso facto*, void on the bankruptcy, that is, against the trustee in bankruptcy; and also if made within ten years, unless the *cestuis que trustent* under the settlement prove that the settlor was solvent at the time without the aid of the property comprised in the settlement, and that the interest of the settlor passed to the trustees of the settlement on the execution thereof. The settlement is not void *ab initio*, but only from the act of bankruptcy; and therefore *bonâ fide* purchasers before that date get a good title. (*Re Carter and Kenderdine*, (1897) 1 Ch. 776.)

Trusts in favour of Creditors.—With regard to trusts in favour of creditors, the general rule is that where the creditors are not in any way privy to it, the deed merely operates as a power to the trustees and is revocable by

the debtor (*Acton* v. *Woodgate*, 2 My. & K. 495), though not after his death by his *cestui que trust.* (*Fitzgerald* v. *White*, 37 C. D. 18.) But such a deed is not revocable if it creates the relation of trustee and *cestui que trust* (*New's Trustee* v. *Hunting*, (1897) 2 Q. B. 19), or if the creditors have been thereby induced to a forbearance of their claims (*Acton* v. *Woodgate*, *supra*), or if they have assented to or acquiesced in it or complied with its terms. (*Biron* v. *Mount*, 24 Beav. 649.) All such trust deeds in favour of creditors must now be registered under the Deeds of Arrangement Act, 1887, within seven days, and if they comprise land of any tenure must be registered under the Land Charges Registration Act, 1888.

Secret Trusts.—Sometimes where there is a gift to a person beneficially on the face of the will, there is a secret understanding that he shall hold the property on certain trusts. And where this is so and the trust is lawful, the trust will be enforced. But if he was not meant to be a trustee, but to have a mere discretion, the Court cannot convert the arbitrary power into a trust. (Lewin, 10th ed. 62.) It is, however, essential for the validity of a secret trust that it should be communicated to the devisee or legatee in the testator's lifetime, and that he should accept the particular trust. (*Witham* v. *Andrew*, (1900) 1 Ch. 237; *Re King*, 21 L. R. Ir. 273.) Where the trust is not so communicated or the trust is unlawful, then there is a resulting trust, and the trustee would hold the property for the heir at law or next of kin, as the case might be. (Lewin, 10th ed. 63.)

Powers in the nature of Trusts.—Sometimes a power is given accompanied by such words of recommendation

in favour of certain objects as to render it a power in the nature of a trust. Such a power is sometimes called a power imperative. But, strictly speaking, a power can never be imperative, for as soon as it becomes imperative it becomes a trust. The essence of a power is that it is optional; the essence of a trust is that it is imperative. (*Att.-Gen.* v. *Downing*, Wilm. 23.) From this essential difference follows this important consequence—that the Court will never execute a mere power, but will always execute a trust. (*Harding* v. *Glynn*, 2 Wh. & Tu. 335; *Re Weekes*, (1897) 1 Ch. 289.) If, therefore, the person who has the power in the nature of a trust does not discharge the duty which the power imposes, the Court will discharge the duty in his place (*Brown* v. *Higgs*, 8 Ves. 561); and in doing so, the Court acts upon the principle that equality is equity, and divides the property equally, although the trustee, if he had chosen to exercise the power, might have used his discretion to give unequal shares. (*Ibid.*; *Willis* v. *Kymer*, 7 C. D. 181.)

Equity never wants a Trustee.—If, therefore, a trustee dies or fails to execute a power in the nature of a trust, the Court will execute it; for if a trust can by any possibility be executed by the Court, the non-execution by the trustee shall not prejudice the *cestui que trust.* (*Brown* v. *Higgs*, 5 Ves. p. 505.) The trust follows the legal estate wheresoever it goes, except in the hands of a purchaser without notice. The legal estate is but the shadow which always follows the trust estate in the eye of a court of equity. (*Att.-Gen* v. *Downing*, Wilm. 22.)

CHAPTER VIII.

CHARITABLE TRUSTS.

CHARITABLE trusts, or what are sometimes called express public trusts, are for the most part subject to the same rules as those which govern express private trusts. There are, however, some important points of difference between the two, which will be presently mentioned; but before doing so it will be well to consider very briefly what is a charitable use or trust, or, in other words, what, in its legal acceptation, is a charity.

What is a Charity?—A charity, then, in its legal acceptation, does not include all those objects which in the wider and popular meaning of the term are supposed to be charitable. The whole subject is governed by the Statute 43 Eliz. c. 4 (see 51 & 52 Vict. c. 42, s. 13), which enumerates what were then deemed to be charitable trusts; and the equity jurisdiction over charitable gifts is still confined to those purposes which the statute enumerates as charitable, or which, by analogy, are deemed within its spirit and intendment.

Without attempting a review of all the cases coming within the purview of the statute, it may be very broadly stated that every disposition is charitable which has for its object either—(1) the relief of the poor; (2) the advancement of learning; (3) the maintenance

or propagation of the Christian religion; or (4) the promotion of any useful public purpose. It is not, however, an easy matter in every case to decide what is a charitable gift, and, in particular, what is a useful public purpose. Thus it has been held that a society for the abolition of the practice of vivisection is a charity (*Re Foveaux*, (1895) 2 Ch. 501), but that an association for the encouragement of yacht racing is not. (*Re Nottage*, (1895) 2 Ch. 649.) Again, the repair of monuments in a church is within the Act (*Hoare* v. *Osborne*, L. R. 1 Eq. 585), but not repairs in a churchyard. (*Tyler* v. *Tyler*, (1891) 3 Ch. 252.) And though the foundation of professorships is within the Act (*Yates* v. *Univ. Coll.*, L. R. 7 H. L. 438), the sanitation or ornamentation of towns is not. (*Faversham* v. *Ryder*, 5 D. M. & G. 350.) Moreover, a gift to a private institution is bad (*Re Slevin*, (1891) 1 Ch. 373), though a gift to an individual for a general charitable purpose is good. (*Lea* v. *Cooke*, 34 C. D. 528.)

Superstitious Trusts.—And here should be noticed the difference between charitable trusts and superstitious trusts. A superstitious trust, *e.g.*, one for saying masses or requiems for the dead, has long been and still is void as being contrary to public policy; and this is so notwithstanding 23 & 24 Vict. c. 134, regulating Roman Catholic charities; but in Ireland a bequest for masses is not illegal, unless void as a perpetuity. (*Small* v. *Torley*, 27 L. R. Ir. 388.)

We will now consider the chief points of difference between charitable and private trusts. And first as regards the favour shown to charities.

(1) If there is an absolute intention to give to

charitable purposes, and to charitable purposes only, the trust will be executed in equity, though the objects and persons be uncertain, and though the gift, had it been to a private individual, would have failed for want of certainty. (*Pocock* v. *Att.-Gen.*, 3 C. D. 342.) But the object, though uncertain, must be distinctly and exclusively charitable, for if it be for charitable and other purposes, or for benevolent purposes, or for charitable and philanthropic purposes, it will be void. (*Re Slevin*, (1891) 1 Ch. 373; *Macduff* v. *M.*, (1896) 2 Ch. 451.) And note that a friendly society is not a charity. (*Cunnack* v. *Edwards*, (1896) 2 Ch. 679; cf. *Bruty* v. *Mackey*, (1896) 2 Ch. 727, and see *Re Lacy*, (1899) 2 Ch. 149.) On the other hand, if the purposes are exclusively charitable, it matters not how uncertain are the objects (*Crawford* v. *Forshaw*, (1891) 2 Ch. 261); and a gift to objects described as "charitable and deserving" is a gift to charitable objects of a deserving nature, and is therefore good. (*Obert* v. *Barrow*, 35 C. D. 472.)

(2) **Cy-pres.**—Where the execution of a charitable trust becomes inexpedient or impracticable, the Court will execute it *cy-près*, that is, as nearly as possible; in other words, where the formal or particular purpose cannot be carried out, the Court will approve a scheme which as nearly as possible executes the general intention. (*Biscoe* v. *Jackson*, 35 C. D. 460; *Re Slevin*, *supra*.) But the doctrine of *cy-près* is only applicable where there is a general intention of charity; and if the donor had but one particular object, and that object cannot be carried out, the doctrine has no application. (*Re White*, 33 C. D. 449; *Re Rendell*, 38 C. D. 213.)

(3) **Resulting Trust—Lapse.**—A third respect in which charities are favoured (though it can hardly be considered a distinct head from the foregoing) is in respect of resulting trusts. Where there is a general intention of charity, and no particular object is mentioned, or such object does not exhaust the fund, there is no resulting trust in favour of the settlor or his representatives, but the Court will execute the general intention. (*Att.-Gen.* v. *Tunnd*, 2 Ves. jr. 1; *Att.-Gen.* v. *Marchant*, 3 Eq. 424.) In like manner, a general intention of charity prevents a lapse in case the particular object ceases to exist before the death of the testator; but if there is no such general intention, and the object fails in the lifetime of the testator, the gift will lapse as in other cases. (*Re Rymer*, (1895) 1 Ch. 19.)

(4) **Perpetuity.**—Gifts to charities are not within or subject to the rule of law against perpetuities, at least to this extent, that where there is a valid immediate gift to one charity, a gift over to another charity is not subject to the rule. But with this exception, the ordinary rule applies to charities. (*Re Bowen*, (1893) 2 Ch. 491; *Alt* v. *Stratheden*, (1894) 3 Ch. 265; and see *Pirbright* v. *Salwey* (1896), W. N. 86.)

(5) **Voluntary Conveyances.**—A voluntary conveyance to a charity was not, even before the Voluntary Conveyances Act, 1893 (*ante*, p. 45), void as against a purchaser under 27 Eliz. c. 4; but since the former Act, there is no longer any distinction in this respect between charities and private individuals, a voluntary conveyance being now in both cases good against subsequent purchasers.

The above are the principal points in which favour is or has been shown to charities by the Court. It only remains to point out one respect in which less favour has been shown to charities than to individuals.

Marshalling.—Assets would not have been marshalled by a court of equity in favour of charities, that is, the Court would not as a general rule marshal the assets by throwing the debts and ordinary legacies on the real estate and personalty savouring of realty, in order to leave the pure personalty available for the charity. (*Ashworth* v. *Munn*, 34 C. D. 391.) But now as regards persons dying after the Mortmain and Charitable Uses Act, 1891, there is no longer any necessity for marshalling in favour of charities, since that Act provides that land may now be given to charities, though it must in most cases be sold within a year from the testator's death (see *Brompton Hos.* v. *Lewis*, (1894) 1 Ch. 297); and personal estate directed to be laid out in land for the benefit of a charity shall be held as if the will contained no such direction (s. 7).

CHAPTER IX.

IMPLIED AND RESULTING TRUSTS.

An implied trust is a trust which is founded on an unexpressed, but presumed, or implied intention. The following are the principal cases of implied trusts:—

I. **Purchase in Name of Another.**—A resulting trust arises in the case of property conveyed or assigned to a third person. Where a conveyance or assignment of property is taken in the names of the purchaser and others, or in the names of others, or another only, and whether jointly or successively, there is a resulting trust in favour of the person who advances the purchase-money. (*Dyer* v. *Dyer*, 2 Wh. & Tu. 803.) The same result follows where two or more persons advance the purchase-money jointly, and the conveyance is taken in the name of one only. (*Wray* v. *Steele*, 2 V. & B. 388.) And in all such cases parol evidence is admissible to prove by whom the money was in fact actually paid. (*James* v. *Smith*, (1891) 1 Ch. 834.)

But no trust will result where the policy of an Act of Parliament would be thereby defeated as, for instance, where land is given to qualify the grantee to vote

(*Childers* v. *C.*, 1 D. & J. 482), or money is deposited in a third party's name in evasion of the Savings Bank Acts. (*Field* v. *Lonsdale*, 13 Beav. 78.)

Advancement.—Resulting trusts, however, as they are founded on a presumption, may be rebutted by parol evidence to the contrary; and where the purchaser is under a legal obligation to provide for the person in whose name the purchase is made, equity raises a presumption that the purchase was intended as an advancement. Thus, in the case of a purchase in the name of a child there is no resulting trust, for the presumption of a resulting trust in favour of the actual purchaser is met and rebutted by the other presumption of advancement. This presumption of advancement is raised, not only in favour of a wife or child, but also in favour of any person towards whom the purchaser has placed himself *in loco parentis*. (*Standing* v. *Bowring*, 31 C. D. 282.) The presumption also arises in the case of a purchase by a widow in the name of her child (*Sayre* v. *Hughes*, L. R. 5 Eq. 376), but not by a married woman, at least not before the Married Women's Property Act, 1882. (*Re De Visme*, 2 D. J. & S. 17.)

The presumption of advancement even in favour of a child may also in turn be rebutted by evidence. The advancement of a son is a mere question of intention, and therefore facts antecedent to or contemporaneous with the purchase may be put in evidence to rebut the presumption. (*Williams* v. *W.*, 32 Beav. 370.) The whole of the surrounding circumstances are to be considered. (*Whitehouse* v. *Edwards*, 37 C. D. 683.) But the acts and declarations of the father *subsequent* to the purchase cannot be used to *rebut* the presumption. (*Williams* v. *W.*, *supra*.) Where a father bought

shares in a company in the name of his son for the purpose of qualifying him as a director, it was held that the purchase was made merely for that purpose and the presumption of advancement was rebutted. (*Re Gooch*, 62 L. T. 384.)

II. **Unexhausted Residue.**—Another instance of a resulting trust is where property is given upon trust, and the trusts fail, either wholly or partially, or do not exhaust the whole property, in which case there is generally (though not invariably, *Cooke* v. *Smith*, (1891) A. C. 297) a resulting trust in favour of the person creating the trust or his representatives. (*Patrick* v. *Simpson*, 24 Q. B. D. 123.) But there is, of course, no resulting trust where the person to take dies or disappears after the trust has once come into operation. (*Re Corbishley's Trust*, 14 C. D. 846.)

Trustee cannot take beneficially.—As a corollary to the above, it is a rule that where property is given simply upon trust, the trustee cannot take beneficially in the event of failure of the trusts. (*King* v. *Denison*, 1 V. & B. 272.) And this is so though there is no one in whose favour the trust can result—that is, no heir as to realty and no next of kin as to personalty—for in such a case the property goes to the Crown or lord. (*Att.-Gen.* v. *Anderson*, (1896) 2 Ch. 596; *Cunnack* v. *Edwards*, (1895) 1 Ch. 489.) This was always so as regards personal estate (*Re Gosman*, 15 C. D. 67), and is so now as regards realty by virtue of the Intestates' Estates Act, 1884, which provides that there shall be an escheat to the Crown of equitable as well as real estates.

Executor may.—There is, however, a distinction in this respect between a trustee and an executor. An executor, like a trustee, stands possessed of any undisposed-of residue in trust for the next of kin, unless it appears that he was intended to take beneficially. (1 Will. IV. c. 40.) The statute, in fact, implies a trust in favour of the next of kin, founded upon an unexpressed but presumed intention. But where there are no next of kin, the executor, unlike a trustee, will take beneficially as against the Crown. (*Re Bacon*, 31 C. D. 460; *cf. Re Wood*, (1896) 2 Ch. 596.)

III. **Conversion.**—Another important class of implied trusts are the resulting trusts which arise under the doctrine of conversion, but these will be more fully considered in a subsequent chapter.

IV. **Joint Tenancies.**—It remains to consider the implied trusts which arise out of joint tenancies. Equity follows the law; and therefore limitations which confer a joint tenancy at law have the same effect in equity. (See *Palmer* v. *Rich*, (1897) 1 Ch. 134.) But equity leans strongly against joint tenancy, with its right of survivorship, and will lay hold of almost any circumstance from which a tenancy in common can be reasonably implied. Therefore, where two or more persons purchase lands and advance the purchase-money in unequal proportions, and this appears on the deed itself, the survivor will be deemed in equity a trustee for the other in proportion to the sum advanced by him. (*Lake* v. *Gibson*, 2 Wh. & Tu. 952; *cf. Kennedy* v. *De Trafford*, (1897) A. C. 180.) And

where money is advanced by way of loan, either in equal or unequal shares, there will in equity be no survivorship, although the mortgage should be joint. (*Re Jackson*, 34 C. D. 732.) And the same rule applies as between partners. (*Waterer* v. *W.*, L. R. 15 Eq. 402; Partnership Act, 1890, s. 20.)

CHAPTER X.

CONSTRUCTIVE TRUSTS.

A CONSTRUCTIVE trust is a trust raised by construction of law to meet the requirements of equity without any reference to a presumed intention. (See *Soar* v. *Ashwell*, (1893) 2 Q. B. at p. 396.) The following are cases of constructive trusts:—

(1) **Lien on Land sold.**—The vendor's lien for unpaid purchase-money is in equity a charge on the land sold. Where the vendor conveys, though the consideration is, on the face of the deed and by receipt endorsed, expressed to have been paid, but it has, in fact, not been paid, then there is a lien for the whole, or such part of the money as remains unpaid. (*Mackreth* v. *Symmons*, 2 Wh. & Tu. 926.) The purchaser, in fact, holds the land as trustee for the vendor, to the extent of the unpaid purchase-money.

This lien may be waived or abandoned by the vendor. But he does not waive it by merely taking collateral security, as, for instance, a bond for the purchase-money. This will not of itself be sufficient to discharge the lien. (*Collins* v. *C.*, 31 Beav. 346; *Clarke* v. *Royle*, 3 Sim. 499.) But if it can be shown that the vendor intended to look merely to the personal credit of the purchaser,

or if it appears that the collateral security was substituted for the purchase-money, or was in fact the consideration bargained for, then the lien will be lost. (*Buckland* v. *Pocknell*, 13 Sim. 406; *Nives* v. *Nives*, 15 C. D. 649; *Re Brentwood*, 4 C. D. 562.) The taking a security is not therefore in itself a positive waiver, and the onus is on the purchaser to show that the vendor agreed to rest on that security and to discharge the land. (*Hughes* v. *Kearney*, 1 S. & L. 135; *Saunders* v. *Leslie*, 2 B. & B. 514.) And even a distinct mortgage on another estate is not necessarily conclusive of such waiver. (*Ibid.*; *Nairn* v. *Prowse*, 6 Ves. 752.)

The lien may be enforced not only against the purchaser and his heir, but also against subsequent purchasers with notice (*Ex parte Golding*, 13 C. D. 628), against a trustee in bankruptcy (*Ex parte Hanson*, 12 Ves. 349), and against a purchaser even without notice, having an equitable title only, for in this last case, the equities being equal, the maxim, *Qui prior est tempore potior est jure*, applies. On the other hand, the lien will not prevail against a *bonâ fide* purchaser without notice who has the legal estate. And by the Conveyancing Act, 1881, s. 55, a receipt for consideration money in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser without notice, be sufficient evidence of the payment thereof.

Somewhat analogous to the lien of the vendor is the lien of the purchaser upon the estate in the hands of the vendor for the whole or part of his purchase-money prematurely paid (*Turner* v. *Marriott*, L. R. 3 Eq. 744), and this happens where, the purchaser having paid a deposit, the purchase goes off through no fault of his. (*Dinn* v. *Grant*, 5 D. & S. 451.) This lien

exists against a subsequent mortgagee with notice (*Watson* v. *Rose*, 10 H. L. C. 672), and generally against the like persons against whom the vendor's lien extends.

As regards land in Yorkshire, it is now provided by the Yorkshire Registries Act, 1884, s. 7, that liens must be registered, and unless registered will have no priority, except in the case of actual fraud. (*Battison* v. *Hobson*, (1896) 2 Ch. 403.)

(2) **Renewal of Lease, &c.**—The most important class of constructive trusts, however, are those raised by a court of equity with regard to persons standing in a fiduciary position. Whenever this is the case and such person, whether directly or indirectly, avails himself of his position to make a profit or gain an advantage, he will be held a trustee of such benefit and accountable accordingly. This principle applies not only to trustees, but also to executors, guardians, agents, directors, promoters and others. But a mere agent of a trustee is not liable as a constructive trustee unless he has received and become chargeable with the trust property, or is a party to a breach of trust. (*Barnes* v. *Addy*, L. R. 9 Ch. 244; Brett's L. C. 13.)

The principle is well illustrated by the leading case (*Keech* v. *Sandford*, 2 Wh. & Tu. 693), which decides that a lease renewed by a trustee or executor in his own name and for his own benefit shall be held upon trust for the person entitled to the old lease, even though the lessor may have refused to grant a renewal to the *cestui que trust*. So if a tenant for life (*Re Ranelagh*, 26 C. D. 590), or a partner (*Bell* v. *Barnett*, 21 W. R. 119), or a mortgagor (*Leigh* v. *Burnett*, 29 C. D. 231), renews, he will be held to be a trustee for the persons interested in

the old lease. The rule, however, only applies to *renewable* leaseholds and not to the purchase of a reversion. (*Longton* v. *Wilsby*, 76 L. T. 770.)

(3) **Improvements.**—A constructive trust also arises where a person, acting *bonâ fide*, permanently benefits the estate of another by repairs or improvements (*Rowley* v. *Ginnever*, (1897) 2 Ch. 503); for although a person spending money by mistake on the property of another has no equity against the owner, yet if the owner seek the assistance of equity, he must do equity, that is, he must make allowance for the expenditure so far as it was necessary or permanently beneficial. (*Re Cook's Mortgage*, (1896) 1 Ch. 923.) It is difficult to lay down a general principle which is in harmony with all the numerous decisions on the point, but it may perhaps be said that ornamental improvements will not be allowed (*Re Gerrard*, (1893) 3 Ch. 252); that improvements in the nature of salvage will always be allowed (*Re Hawker*, 66 L. J. Ch. 341; *Re Montagu*, (1897) 2 Ch. 8), and that in some cases improvements which enhance the value of the property will be allowed. (*Henderson* v. *Astwood*, (1894) A. C. 150; *Re Cook*, *supra*.) A tenant for life, however, can now borrow money for improvements under the Improvement of Land Acts, 1864 to 1899, and the repayment will be a charge upon the property. Also by the Settled Land Acts, capital money may be expended in improvements. But in neither of these cases is there any question of a constructive trust.

(4) **Heir Trustee for Personal Representatives.**—Formerly on the death of a mortgagee intestate, the mortgaged estate descended to his heir, who was held a

constructive trustee of the legal estate for the legal personal representatives who were entitled to the money. But now by the Conveyancing Act, 1881, s. 30, the legal estate in every case, whether the mortgagee dies testate or intestate, descends to the legal personal representative, except in the case of copyholds, with regard to which the old law still holds good. (Copyhold Act, 1894, s. 88.) And by the Land Transfer Act, 1897, all real estate, other than copyholds, now vests in the legal personal representatives of any person dying after the Act, who shall hold it (subject to the liabilities imposed by the Act) for the persons beneficially entitled thereto.

CHAPTER XI.

TRUSTEES: THEIR POWERS AND DUTIES.

Who may be Trustees. — Generally speaking, all persons, including infants, married women, corporations, aliens and bankrupts, are capable of being trustees (Lewin, 28 *et seq.*), and a trustee does not cease to be such on becoming a convict. (Trustee Act, 1893, s. 48.)

But, though all persons are *capable*, they are not all equally *fit* to be trustees; and on the ground of want of fitness, the Court will generally refuse to appoint aliens if domiciled abroad, married women and infants (Lewin 36, 40; *Re Peake*, (1894) 3 Ch. 520); and may remove a trustee if convicted of felony or bankrupt. (T. A., 1893, s. 25; *Re Danson*, 48 W. R. 73; *Re Foster*, 55 L. T. 479.)

Equity never wants a Trustee.—It is a rule in equity, which admits of no exception, that where a trust exists, equity never wants a trustee. And where there is a perfect trust, whether express, implied or constructive, equity will follow the legal estate, and decree the person in whom it is vested to execute the trust. (Lewin, 1017.) If there are no trustees, the Court assumes the office in the first instance (Lewin, 1019); and may, under the Judicial Trustee Act, 1896, appoint the

official solicitor or some other person to be a judicial trustee. But the Court cannot appoint a trustee to discharge the duties of an executor. (*Eaton* v. *Daines* (1894), W. N. 32.)

Disclaimer and Retirement.—A trustee, if he disclaim, should do so by deed, and without delay, though there is no rule on either point, except as regards married women who must disclaim by deed. (Lewin, 210.) If an executor, who is also trustee, prove the will, he thereby accepts the trust. (Lewin, 10th ed. 217). But a trustee who has accepted the trust cannot afterwards *renounce*. He can then only retire in one of the following ways: (a) with the consent of all the parties interested if *sui juris*, (b) with the sanction of the Court, (c) under a special power in the instrument, (d) under a statutory power. (*Manson* v. *Baillie*, 2 Macq. H. L. C. 80; Lewin, 270.) With regard to statutory powers, the Trustee Act, 1893, s. 11 (replacing Conv. Act, 1881, s. 32), enables a trustee by deed to retire, where there are two remaining trustees, and they, together with the person entitled to appoint new trustees, consent by deed to the retirement. The Judicial Trustees Act, 1896, rule 23, also makes provision for the retirement of a judicial trustee.

Devolution.—On the death of a trustee, the trust survives to the surviving trustees (Trustee Act, 1893, s. 22; *Crawford* v. *Forshaw*, 43 C. D. 643). On the death of a sole or sole surviving trustee, the trust property, if real estate, formerly devolved upon the devisee or heir. But now it vests in all cases in the personal representatives of the trustee, and this notwithstanding any testamentary disposition. (Conv. Act,

1881, s. 30, and see Land Trans. Act, 1897.) But this does not apply to copyholds, and therefore the old law will still apply to these. (Copyhold Act, 1894, s. 88; *Re Mills*, 37 C. D. 312; 40 *ibid.* 14.)

Delegation.—*Delegatus non potest delegare* applies to trustees, and therefore a trustee cannot delegate his office (*Eaves* v. *Hickson*, 30 Beav. 136). But this does not mean that he cannot employ an agent. The cases, often cited as exceptions to the rule, in which agents have been employed, are not really exceptions at all; for a trustee does not by employing an agent in a proper case delegate his office or discretion. A trustee is and always has been justified in employing an agent in a proper case, that is, where there is any moral necessity for so doing, or where, in the ordinary course of business, an agent would be naturally and properly employed. (*Speight* v. *Gaunt*, 9 A. C. 1.) Thus a trustee may employ a solicitor or banker, or broker, or other professional agent, subject to the qualification that the agent must not be employed out of the ordinary scope of his business. (*Fry* v. *Tapson*, 28 C. D. 268.) Thus he should not employ a solicitor to choose a valuer (*ibid.*), nor leave securities in his hands (*Field* v. *F.*, (1894) 1 Ch. 425), nor leave money in the hands of a broker (*Speight* v. *Gaunt*, *supra*); but he must do what is customary and reasonable. Further, a trustee must exercise his discretion in the choice of his agents, but so long as he selects persons properly qualified, he is not responsible for their intelligence or honesty. (*Re Weall*, 42 C. D. 674; *Re Gasquoine*, (1894) 1 Ch. 470.) It follows that he should not employ an outside broker (*Robinson* v. *Harkin*, (1896) 2 Ch. 415), nor a solicitor who acts for the borrower (*Waring* v. *W.*, 3 Ir. Ch. R.

331; *Re Stuart*, (1897) 2 Ch. 583; cf. *Sheffield* v. *Aizlewood*, 44 C. D. 412, 457). And even the employment of a competent surveyor will not exempt him from liability if he lends money on property of a speculative value. (*Re Whiteley*, 12 A. C. 727.)

By the Trustee Act, 1893, s. 17, a trustee may appoint a solicitor as agent to receive any money or property receivable by the trustee by permitting the solicitor to have the custody of the deed containing a receipt. And may appoint a banker or solicitor to receive policy moneys by permitting him to have the policy with a receipt signed by the trustee. But the section does not exempt from liability where the money is left with the agent longer than is necessary. (*Re Hetling*, (1893) 3 Ch. 269.)

Duties.—In the employment of agents, and, indeed, in all other transactions, the law requires of a trustee the same diligence and care that a man of ordinary prudence exercises in his own affairs. (*Speight* v. *Gaunt*, 9 A. C. p. 19.) And if he takes such care he will not be liable for accidental loss, as, for instance, by robbery (*Jobson* v. *Palmer*, (1893) 1 Ch. 71), or depreciation of securities (*Re Chapman*, (1896) 2 Ch. 763), or default of an agent properly employed. (*Re Gasquoine*, (1894) 1 Ch. 470.) If a trustee or executor neglect the duties of his office, he will, of course, be liable for any loss, as if he permits trust property to remain unnecessarily in the hands of a banker or solicitor (*Darke* v. *Martyn*, 1 Beav. 525; *Field* v. *F.*, (1894) 1 Ch. 425), or under the sole control of his co-trustee (*Scotney* v. *Lomer*, 29 C. D. 535), or if he mix trust moneys with his own (*Re Hallett*, 13 C. D. 696), or lend on a con-

tributory mortgage. (*Webb* v. *Jonas*, 39 C. D. 660; *Stokes* v. *Prance*, (1898) 1 Ch. 212.)

Discretion.—With regard to discretions the same rule applies—a trustee must do what a prudent man would do under similar circumstances—but there is in the nature of things a distinction between a duty and a discretion, the former requiring a rigid adherence, while the latter only requires a fair exercise. There is, therefore, as might be expected, a greater latitude discernible in the cases dealing with the latter. If a trustee exercise his discretion fairly and honestly, as a reasonable man would do, he will not be liable for any loss nor will his discretion be interfered with. (*Re Laing*, (1899) 1 Ch. 593; *Re Chapman*, (1896) 2 Ch. 763; *Re Stuart*, (1897) 2 Ch. 583; *Re Lever*, 76 L. T. 7.) But a trustee must exercise his discretion fairly and honestly, however wide and absolute the discretion given to him. A trustee, therefore, is not justified in making or continuing an investment, though expressly authorized by the trust, if it is one which a reasonable man would not have chosen for his own money. (*Re Smith*, (1896) 1 Ch. 71; *Knox* v. *Mackinnon*, 13 A. C. 753; *Re Whiteley*, 12 A. C. 727; *Re Tucker*, (1894) 3 Ch. 429.) But if he exercise his discretion fairly and honestly he will not be liable (*Tabor* v. *Brooks*, 10 C. D. 273; *Smethurst* v. *Hastings*, 30 C. D. 490), even though he lend on merely personal security. (*Re Laing*, (1899) 1 Ch. 593.) The Court will not interfere with a trustee's discretion unless he is influenced by improper motives. (Lewin, 10th ed. 728; *Re Lever*, 76 L. T. 71.) And a decree for administration does not necessarily take away his discretion though he should exercise it with the sanction

of the Court. (*Bethell* v. *Abraham*, 17 Eq. 24; 54 L. J. Ch. 527; *Re Higginbottom*, (1892) 3 Ch. 132.)

Relief under Judicial Trustees Act.—There are, however, cases where a trustee is liable for loss though he has acted honestly and reasonably. (*Perrins* v. *Bellamy*, (1899) 1 Ch. 797.) To meet such cases the Judicial Trustees Act, 1896, s. 3, provides that the Court may relieve against liability if the trustee has acted both honestly and reasonably. (*Re Barker*, 77 L. T. 782.) A trustee who leaves everything to his co-trustee does not act "honestly or reasonably." (*Re Second East Dulwich, &c.*, 68 L. J. Ch. 196; *Re Turner*, (1897) 1 Ch. 536.)

Remuneration.—It is an established rule that trustees and executors shall, as a general rule, have no remuneration for their care and trouble, for a trustee shall not profit by his trust either directly or indirectly (*Robinson* v. *Pett*, 2 Wh. & Tu. 606; *Re Thorpe*, (1891) 2 Ch. 360; *Re Smith*, (1896) 1 Ch. 71), unless there is a provision in the trust deed entitling him thereto (*Bignell* v. *Chapman*, (1892) 1 Ch. 59), and even a solicitor trustee is not entitled to charge for non-contentious business, except costs out of pocket, unless there is such a provision (*Burgess* v. *Vinnicombe*, 34 C. D. 77); but as regards contentious business he is entitled to reasonable profit costs. (*Re Corsellis*, 34 C. D. 675.) Where he is authorized to charge for professional services he can only charge for services strictly professional. (*Re Chapple*, 27 C. D. 584.) *Secus*, if he is authorized to make other charges. (*Re Ames*, 25 C. D. 72; *Re Fish*, (1893) 2 Ch. 413.) There is, however, nothing to prevent a trustee contracting to receive remuneration, if

fair and reasonable, or even a commission (*Re Freeman*, 37 C. D. 148), and his liability is not thereby increased. (*Jobson* v. *Palmer*, (1893) 1 Ch. 71.)

Purchase by Trustee.—A trustee cannot, as we have seen, obtain any profit or advantage out of his trust, as by renewing a lease (*ante*, p. 69). So a trustee for sale is absolutely disabled from purchasing the trust property from himself, either directly or indirectly; and however fair the transaction, it may be set aside. (*Fox* v. *Mackreth*, 1 Wh. & Tu. 141.) But there is no rule that a trustee, whether for sale or otherwise, cannot purchase from his *cestui que trust* (Lewin, 10th ed. 554), though it is a transaction of great nicety and watched by the Court with the utmost jealousy. There must be the fullest information given and no advantage taken; indeed, the parties must be at arm's length or the relation virtually dissolved. (Lewin, 10th ed. 555; *Hickley* v. *H.*, 2 C. D. 190.) The onus is on the trustee to show the fairness of the transaction and he must make full disclosure. (*Boswell* v. *Coaks*, 11 A. C. 232.) But a bare trustee, or one who has disclaimed, may lawfully purchase. (*Clark* v. *C.*, 9 A. C. 733; *Hickley* v. *H.*, *supra*.)

Co-trustees.—Where there are co-trustees the office is a joint one. They have only a joint interest, power and authority, and must all join in conveyances and receipts. (*Re Flower*, 27 C. D. 592.) As, however, it would often be inconvenient and impracticable for all to receive trust moneys, it cannot be inferred from a trustee joining in a receipt that he has received the money, and he can prove the contrary. (Lewin, 10th ed. 284; and see Trustee Act, 1893, s. 24.) But

it is otherwise with regard to co-executors, since each can give a receipt, and if they all join in a receipt it is a purely voluntary act, and it will be presumed that they jointly received the money. (*Brice* v. *Stokes*, 11 Ves. 319; *Gasquoine* v. *G.*, (1894) 1 Ch. 470.)

One trustee is not liable for the acts or defaults of his co-trustee unless he contributed to it. (Lewin, 10th ed. 283; *Townley* v. *Sherborne*, 2 Wh. & Tu. 629.) But if he leaves the trust property under the sole control of his co-trustee (*Robinson* v. *Harkin*, (1896) 2 Ch. 415), or otherwise leaves matters entirely in the hands of the co-trustee, he will be liable. (*Re Turner*, (1897) 1 Ch. 536; *Re Second East Dulwich, &c.*, 79 L. T. 726.)

Contribution and Indemnity.—Where co-trustees are jointly implicated in a breach of trust, each is liable for the whole loss, though judgment may have been obtained against them jointly. (Lewin, 10th ed. 1116; *Blyth* v. *Fladgate*, (1891) 1 Ch. 337, 358.) But, as between the trustees themselves, the loss may be apportioned, for he who refunds the loss is entitled to contribution. (*Robinson* v. *Harkin*, (1896) 2 Ch. 415.) And in some cases, as where the defaulting trustee is the solicitor of the trust, or derives a personal benefit from the breach of trust, he may be compelled to indemnify his co-trustees. *Bahin* v. *Hughes*, 31 C. D. 390; *Head* v. *Gould*, (1898) 2 Ch. 250.) Where the trustee is also a beneficiary, the whole of his beneficial interest must be applied in making good the loss, if he derived an exclusive benefit from the breach of trust. (*Chillingworth* v. *Chambers*, (1896) 1 Ch. 685.) And by the Trustee Act, 1893, s. 45, the interest of a beneficiary instigating a breach of trust may now be im-

pounded by the Court. (*Re Somerset*, (1894) 1 Ch. 231; *Re Holt*, (1897) 2 Ch. 525.) The re-imbursement of the trustee is usually out of residue, but it may be out of income. (*Scott* v. *Milne*, 25 C. D. 710.) The Trustee Act, 1893, s. 24, adopts, but does not extend, the principle of indemnity. (*Re Brier*, 26 C. D. 238, 243.)

Securing Trust Fund.—Where the trust fund is an equitable interest, the trustee should lose no time in giving notice of his title to the person having the legal interest, otherwise priority might be gained by a purchaser without notice. (*Stephens* v. *Green*, (1895) 2 Ch. 148.) Also, he should be active in getting in choses in action. (*Re Grindey*, (1898) 2 Ch. 593.) And should not allow money to remain outstanding on *personal* security, however good (*Paddon* v. *Richardson*, 7 D. M. & G. 56; *Greaves* v. *Strahan*, 8 D. M. & G. 291), unless expressly authorised to do so. (*Re Smith*, (1896) 1 Ch. 71; *Re Laing*, (1899) 1 Ch. 593.) There is no rule that trustees may not retain authorised securities, even of a risky nature, if they act honestly and prudently. (*Re Chapman*, (1896) 2 Ch. 763.)

Howe v. Dartmouth.—As a general rule, where a testator subjects the residue of his personal estate to a series of limitations, and there is no contrary intention, such part as is of a wearing-out nature, as leaseholds, must be converted for the protection of the remaindermen, and such part as is of a reversionary nature must also be converted for the protection of the tenant for life. (*Howe* v. *Dartmouth*, 1 Wh. & Tu. 68; *Re Game*, (1897) 1 Ch. 881.) The rule is to be applied unless there is a sufficient indication of an intention against it, and the onus lies on the person who says it is not to be

applied. (*Macdonald* v. *Irvine*, 8 C. D. 101.) But it is not generally applicable to an absolute gift subject to an executory limitation (*Re Bland*, (1899) 2 Ch. 336), nor where there is a discretionary power of sale. (*Re Pitcairn*, (1896) 2 Ch. 199.) The rule may be negatived by an implied direction to enjoy *in specie* (*Ward* v. *Thomas*, (1891) 3 Ch. 482), but the right to enjoy *in specie* will not be readily implied. (*Re Game*, *supra*.)

Where the conversion of outstanding personal estate is postponed, the method of computing the interest to which the tenant for life is entitled is as follows: ascertain the sum which, put out at interest at 3 per cent. on the testator's death and accumulating at compound interest, would, after deducting income tax, amount on the day when the property falls in or is realised to the sum actually received; the sum so ascertained represents capital; the difference between that sum and the sum actually received represents income, to which the tenant for life is entitled. (*Re Chesterfield*, 24 C. D. 643; *Re Morley*, (1895) 2 Ch. 738; *Re Flower*, 62 L. T. 217.) The rate of interest is now 3 per cent. (*Re Barclay*, (1899) 1 Ch. 674.)

Investment.—Under the Trustee Act, 1893, trustees may, if they have power to invest at all (*Re Manchester*, &c., 43 C. D. 420), and are not expressly forbidden by the instrument creating the trust, invest trust funds in any of the investments there specified, and may vary any such investment. (*Re Outhwaite*, (1891) 3 Ch. 494; *Hume* v. *Lopes*, (1892) A. C. 112.) And by the Trustee Act, 1894, s. 4, a trustee is not liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment autho-

rized by the instrument of trust or by law. (*Re Chapman*, (1896) 1 Ch. 323.)

A power to invest in "real securities" does not authorize investment in the *purchase* of land. But it does authorize investment on mortgage of long leaseholds or on charges or mortgage of charges under the Improvement of Land Acts (Trustee Act, 1893, s. 5). "Real securities" also include road bonds and mortgages of tolls, but not railway mortgages. (Lewin, 10th ed. 368.)

Under the Trustee Act, 1893, s. 8, a trustee lending on mortgage is not liable if he acts upon a report of an able practical surveyor instructed and employed independently of any owner of the property, and the amount of the loan does not exceed two-thirds of the value as stated in the report, and the loan was made under the advice of the surveyor in the report. The report must state the value of the property. (*Re Stuart*, (1897) 2 Ch. 583.) Where the mortgage would be a proper investment for a smaller sum, the trustee is only liable to make good the sum advanced in excess thereof with interest (s. 9). But if the investment is an improper one, independently of value, it will not be deemed an authorized investment for a smaller sum. (*Re Turner*, (1897) 1 Ch. 536; *Head* v. *Gould*, (1898) 2 Ch. 250.)

Trustees and executors have no authority to carry on their testator's business, unless directed by the will to do so. (*Arnold* v. *Smith*, (1896) 1 Ch. 171.) Where a testator so directs and authorizes a specific or limited portion of the trust estate to be employed for the purpose, the general rule is that the trustee or executor, though personally liable for the trade debts, has a right to be indemnified out of the portion so directed to be

employed, and the trade creditors are entitled to stand in the place of the trustee and to obtain payment out of such specific fund (*Ex parte Garland*, 10 Ves. 120), subject of course to the prior right of the trustee to indemnity. (*Dowse* v. *Gorton*, (1891) A. C. 190; *Brooke* v. *B.*, (1894) 2 Ch. 600.) But this rule does not apply when the trustee is in default to the trust estate, and he is not, therefore, entitled to indemnity except upon the terms of making good the default, and the creditors are in no better position. (*Shearman* v. *Robinson*, 15 C. D. 548; *Evans* v. *E.*, 34 C. D. 597.) But where the trustee or executor has no power to carry on the business, neither he nor the creditors have any such right. (*Strickland* v. *Symonds*, 26 C. D. 245.)

Following Trust Fund.—With regard to the remedies of the *cestuis que trust* for a breach of trust, there is of course the personal liability of the trustees which, as we have seen, is joint and several; and this liability, in some cases, extends to the solicitors of the trustees. *Blyth* v. *Fladgate*, *supra*; *Mara* v. *Browne*, (1896) 1 Ch. 199.) But the *cestui que trust* may also follow the trust property, the rule being that property entrusted to a person in a fiduciary position may be followed as long as it can be traced. (*Re Hallett*, 13 C. D. 696.) The following propositions are deducible from the cases: (1) Where the property has been wrongfully disposed of, the *cestui que trust* may take the proceeds of sale he can identify them (*Hopper* v. *Conyers*, 2 Eq. 5 (2) Where purchases are made with trust mo ties of may either take the property purchased or have tisements on it for the amount (*Cave* v. *C.*, 15 C. D. ict. c. 35, (3) Where the purchase is made with advertise in he is entitled to a charge for the amo inistration suit

money laid out (*cf. Re Champion*, (1893) 1 Ch. 101); (4) Where the trust money is mixed with other moneys in the hands of a bailee, as, for instance, a banker, it is still regarded as separate; and if the trustee in such a case draws cheques for his private expenses it will be presumed that he drew them on his own fund, and not on the trust fund (*Re Hallett, supra*); and where the trust moneys belong to separate trusts, the sum first paid in is held to have been first drawn out. (*Re Stenning*, (1895) 2 Ch. 433.) The principle above stated applies to all persons in a fiduciary position (*Lyell* v. *Kennedy*, 14 A. C. 459; *Hancock* v. *Smith*, 41 C. D. 456; *Re Murray*, 57 L. T. 223), but not to commission agents (*Kirkham* v. *Peel*, 28 W. R. 491; *Re Thorpe*, (1891) 2 Ch. 360), nor an agent who is not the agent of the person defrauded (*New Zealand, &c.* v. *Watson*, 7 Q. B. D. 374), nor against a purchaser for value without notice. (*Taylor* v. *Blakelock*, 32 C. D. 560.)

Impounding.—Where a trustee commits a breach of trust at the instigation of a beneficiary, the Court may impound the interest of the beneficiary by way of indemnity to the trustee, and this is so even where the beneficiary is a married woman restrained from anticipation. (T. A. 1893, s. 45.) The power is discretionary (*Re Somerset*, (1894) 1 Ch. 231), and the Court will be slow to exercise it where the trustee is in default. (*Bolton* th *Curre*, (1895) 1 Ch. 544.) It is not necessary to bring do sh action to enforce the indemnity. (*Re Holt*, (1897) a testa 525.) The beneficiary must have been cognisant portion c facts if not of their legal effect. (*Mara* v. pose, the 895) 2 Ch. 69, 91.) though perso to be indemnifi ustees who have retained or neglected to

invest trust funds will be charged with interest. The rate of interest is now 3 per cent. (*Re Barclay*, (1899) 1 Ch. 674.) But they will be charged a higher rate of interest where they have been guilty of misconduct, or have received or ought to have received more. (*Jones* v. *Foxall*, 15 Beav. 392.) And they will be charged compound interest where they ought to have received it, as where there is a trust for accumulation. (*Re Barclay*, *supra*.)

Bar of Remedy.—Besides having his interest impounded under T. A. 1893, s. 45, a *cestui que trust* may be barred of his remedy against the trustee for a breach of trust by acquiescence or release (*London Fin. Ass.* v. *Kelk*, 26 C. D. 107), by concurrence (*Sawyer* v. *S.*, 28 C. D. 595; *Garnes* v. *Applin*, 31 C. D. 147), or by laches. But in the case of an *express* trust, mere lapse of time will not of itself, apart from any statute of limitation, bar the remedy. (*Re Cross*, 20 C. D. 109; *Rochefoucauld* v. *Boustead*, (1897) 1 Ch. 196.)

The effect of the Trustee Act, 1888, s. 8, appears to be to enable a trustee, whether the trust is express or not, to plead the statute except where he is guilty of fraud, or still retains the trust property, or has converted it to his own use. (*Thorne* v. *Heard*, (1894) 1 Ch. 599; and *How* v. *Winterton*, (1896) 2 Ch. 626.)

Accounts.—A *cestui que trust* is entitled to f[illegible] still [illegible]ght of mation with regard to the state of the trust. therefore, is bound to keep accurate accou[illegible] first duties of always ready with them. (Wms. on Acc[illegible] advertisements *cestui que trust* has also an absolute rig[illegible]23 Vict. c. 35, the accounts (*Re Fish*, (1893) 2 Ch. 41[illegible] shall advertise in his interest be reversionary (*Re Dartn*[illegible] ministration suit

474), and is entitled to be satisfied as to their correctness by production of documents. (*Re Tillott*, (1892) 1 Ch. 86.) On the other hand, the trustee is entitled to have his accounts examined and settled, and to have a release, but not a release under seal. (Wms. on Account, 209.) A settled account may, however, be reopened on certain grounds, or liberty may be given to surcharge and falsify. (*Post*, Chap. XXI.)

New Trustees.—Under the Trustee Act, 1893, ss. 25—41, the Court may appoint a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees, whenever it is inexpedient or difficult to do so without the aid of the Court. Apart, however, from the Act, the Court has inherent jurisdiction to remove old trustees and appoint new ones in their place, when necessary, in the interest of the trust (*Letterstedt* v. *Broers*, 9 A. C. 371; *Re Moss*, 37 C. D. 518); and may now on summons remove a trustee who is bankrupt or a felon. (*Re Danson*, 48 W. R. 73.)

Payment into Court.—Under the Trustee Act, 1893, s. 42, trustees and executors, or the major part of them, may, on affidavit, without any other legal proceeding, pay trust moneys or transfer securities into Court. (*Re* *Curre*, slow to pay must not pay in without sufficient reason, regard to the facility now given for deciding originating summons, and if they do so liable for costs. (Lewin, 10th ed. 411, 525.)

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CHAPTER XII.

ADMINISTRATION OF ASSETS.

Assets.—The effect of the Land Transfer Act, 1897, broadly speaking, is to vest the whole property or assets of a person dying after 1897 in his legal personal representatives. Formerly they were only concerned, *virtute officii*, with personal estate. And it will thus be seen that the Act effects a most important change in their position. They are now, notwithstanding any testamentary disposition, legal owners of all the deceased's property, except copyholds, joint property and, *semble*, personal property over which the testator had a power of appointment, which still seems to be equitable assets.

Formerly there was a distinction of some importance between legal and equitable assets, but the distinction has almost ceased to exist in consequence of Hinde Palmer's Act (32 & 33 Vict. c. 46) and the Land Transfer Act, 1897. The distinction, however, still apparently exists with regard to an executor's right of retainer. (*Walters* v. *W.*, 18 C. D. 182.)

Advertisements for Claims.—One of the first duties of an executor or administrator is to issue advertisements under Lord St. Leonards' Act (22 & 23 Vict. c. 35, s. 29), which provides that where he shall advertise in the same way as the Court in an administration suit

(*Re Bracken*, 43 C. D. 1) for creditors and others to come in and prove their claims, he may distribute the assets, having regard only to the claims of which he has notice, and shall not then be liable. The Act goes on to provide that this shall not prejudice the rights of any creditor or claimant to follow the assets into the hands of persons who have received them. The provision applies to claims of next of kin as well as to claims of creditors; and affords protection to the sureties in an administration bond, where the administrator has pursued the prescribed course. (*Newton* v. *Sherry*, 1 C. P. D. 246.)

Payment of Debts.—An executor cannot pay a debt barred by the Statute of Frauds (*Re Rownson*, 29 C. D. 358); but he may, generally speaking, pay a debt barred by the Statute of Limitations. (*Midgley* v. *M.*, (1893) 3 Ch. 282; *Re Wenham*, (1892) 3 Ch. 59.) He may pay a claim, though uncorroborated. (*Re Griffin*, 79 L. T. 442.) And under the Trustee Act, 1893, s. 21, he may pay or allow any debt or claim on any evidence he thinks sufficient, and may accept a composition, compromise, abandon, submit to arbitration or otherwise settle any debt or claim in good faith. (*Re Brogden*, 38 C. D. 546; *De Cordova* v. *D.*, 4 A. C. 692.)

Among creditors of equal degree a legal representative may pay one in preference to another, even after action brought by that other (*Re Radcliffe*, 7 C. D. 733); but not against another of a higher degree. (*Re Hankey*, (1899) 1 Ch. 541.) In like manner an executor has a right to retain for his own debt in preference to all other creditors of equal degree (*Re May*, 45 C. D. 499; *Re Fludyer*, (1898) 2 Ch. 562), and so may an administrator, even though his bond provides that he

shall not prefer his own debt. (*Davies* v. *Parry*, (1899) 1 Ch. 602.) But after an administration order he cannot prefer one creditor to another (*Re Barrett*, 43 C. D. 70), though he may still retain his own debt. (*Re Giles*, (1896) 1 Ch. 956.)

Priority of Debts.—After paying duty and the funeral and testamentary expenses (*Sharp* v. *Lush*, 10 C. D. 468), the executor or administrator should pay the debts in the following order:—(1) Debts due to the Crown by record or specialty; (2) Debts having preference under particular statutes, as, for instance, income tax, poor rates, &c.; (3) Judgments duly registered, and unregistered judgments recovered against the personal representatives prior to the order for administration; (4) Recognizances and statutes, the latter, however, being practically obsolete; (5) Debts by specialty and by simple contract *pari passu*, including rent, unregistered judgments other than as above, and dilapidations; (6) Voluntary bonds, unless assigned for value, in which case they would come within the fifth group. (For further information as to priority, see Williams on Legal Representatives, 104 *et seq.*)

Where, however, the estate is insolvent and is being administered in the Chancery Division the priority as to rates and wages given by the Preferential Payments in Bankruptcy Act, 1888, applies; and consequently such rates and wages would, in the case of an insolvent dying after the Act, be paid before all other debts, except the costs of administration. (*Re Heywood, Parkington* v. *Heywood*, (1897) 2 Ch. 593.)

The Judicature Act, 1875, s. 10, provides that in the administration of insolvent estates the same rules shall prevail as to the respective rights of secured and un-

secured creditors and as to debts and liabilities provable, as may be in force for the time being in bankruptcy. The section, however, does not incorporate the rules of bankruptcy into such administration for all purposes. (*Re May*, 45 C. D. p. 502.) The sole object of the section was to get rid of the old rule in Chancery under which a secured creditor could prove for the full amount of his debt and realize his security afterwards, and put him on the same footing as in bankruptcy, where he was only entitled to prove for the balance after realizing his security. (*Lee* v. *Nuttall*, 12 C. D. 61.)

Order in which Assets applied.—Where an estate is insolvent another important point has to be considered, and that is the rights of the beneficiaries as amongst themselves; in other words, in what order are the assets to be applied for the payment of debts. The order in which the assets are to be applied, and which has not been altered by the Land Transfer Act, 1897, is as follows:—Subject to the expression of a contrary intention, and, as regards mortgage debts, to Locke King's Acts (see *infra*), assets are now generally applied in the payment of debts in the following order:—(1) The general personal estate, including appointable personalty passing under a residuary bequest (*Williams* v. *W.*, (1900) 1 Ch. 152); (2) Lands expressly devised or directed to be sold for the payment of debts; (3) Real estate descended; (4) Real and personal property specifically devised or bequeathed, but charged with the payment of debts (*Hurst* v. *H.*, 28 C. D. 159); (5) General pecuniary legacies *pro rata* (*Re Salt*, (1895) 2 Ch. 203); (6) Specific bequests, specific devises, and residuary devises not charged with debts (*Farquharson*

v. *Floyer*, 3 C. D. 109; Brett's L. C. 237); (7) Personalty and realty specifically appointed by the testator (*Williams* v. *W.*, *supra*); (8) Paraphernalia, where not now separate estate (*Tasker* v. *T.*, (1895) P. 1).

Primary liability of Personalty.—The personal estate constitutes the primary and natural fund for the payment of debts and legacies, unless there is a plain intention to exonerate it. And to constitute such plain intention it is not enough that the real estate should be charged, but there must appear an intention so expressed as to convince a judicial mind that it was meant not merely to charge the real estate, but so to charge it as to exempt the personal estate. (*Broadbent* v. *Barrow*, 31 C. D. 113.) But the rule does not apply where a specific part of the personal estate is so charged. (*Trott* v. *Buchanan*, 28 C. D. 446.)

It may here be noticed that by 27 & 28 Vict. c. 112, a judgment debt even though duly registered is not a charge on land until execution is issued (*Hood Barrs* v. *Cathcart*, (1895) 2 Ch. 411), either legal by *elegit* and delivery, or equitable by a receiver (*Re Mersey Rail. Co.*, 37 C. D. 610), which must be registered at the Land Registry. (51 & 52 Vict. c. 51.)

Locke King's Act.—Formerly, the primary liability of the personal estate to pay the debts extended to mortgage debts. But by Locke King's Act (17 & 18 Vict. c. 113) the primary liability for mortgage debts was shifted from the personal estate to the mortgaged estate itself, except where there is a contrary intention. In other words, the person taking the land is no longer entitled to have the mortgage debt paid out of the personal estate, but takes subject to the burthen. The

Act, however, does not apply to an estate tail (*Re Anthony*, (1893) 3 Ch. 498), but it applies to equitable mortgages (*Pembrooke* v. *Friend*, 1 J. & H. 132), and to land taken in execution under an elegit (*Re Anthony*, (1892) 1 Ch. 450), and to copyholds. (*Piper* v. *P.*, 1 J. & H.) The Act was further extended by 30 & 31 Vict. c. 69 and 40 & 41 Vict. c. 34, so as to apply to an intestacy, to lands of any tenure, including leaseholds, and to a lien for unpaid purchase-money. These three Acts are also called the Real Estate Charges Acts.

Retainer by Executor.—With regard to any debt which may be owing by the deceased to the executor personally, the latter has a right of retainer in priority to all other creditors of equal degree (*Re Fludyer*, (1898) 2 Ch. 562; *Re Hankey*, (1899) 1 Ch. 541), and this right is supposed to have arisen from his inability to sue himself. An administrator has the same right even though he has entered into a bond not to prefer his own debt. (*Davies* v. *Parry*, (1899) 1 Ch. 602.) This right is not lost by an order for administration or payment into Court, or by mere delay so long as there are assets available (*Re Giles*, (1896) 1 Ch. 956; *Re Langley*, 68 L. J. Ch. 361), or by payment to an official receiver (*Re Rhoades*, (1899) 2 Q. B. 347); but there is no retainer out of assets got in by a receiver (*Re Jones*, 31 C. D. 440), or out of assets that are merely equitable. (*Walters* v. *W.*, 18 C. D. 182; *Re Baker*, 44 C. D. 272.) A debt may be retained though barred by the Statute of Limitations, though not one barred by the Statute of Frauds. (*Field* v. *White*, 29 C. D. 358.)

The executor, after paying the funeral and testamentary expenses and the debts in the order already mentioned, should proceed to pay the various legacies,

bearing in mind the rules as to lapse, ademption and priority, which subjects will be dealt with in a subsequent chapter.

Administration Orders.—Formerly, any person interested in the residue was entitled as of right to an order for the full administration of the estate. This is now completely altered, the Court is no longer obliged to make an order for administration (Ord. LV., r. 10), and all applications for such orders are at the risk of the applicant. (*Re Blake*, 29 C. D. 913.) The practice now is to apply by originating summons for an order determining any question relating to administration without an order for administration of the estate. (Ord. LV. rr. 3, 5.) An application for an administration order is sometimes made by the executor or administrator himself when he finds the affairs of his testator or intestate so involved that he cannot safely administer the estate, except under the direction of the Court. But such applications are not encouraged, and the executor or administrator will be made to pay the costs of any unnecessary or vexatious proceedings. (*Re Cabburn*, 46 L. T. 848.)

Actions for administration are barred by statute in the case of simple contract creditors after six years; in the case of judgment creditors after twelve years (*Jay* v. *Johnstone*, (1893) 1 Q. B. 189); in the case of legatees after twelve years (*Re Barker*, (1892) 2 Ch. 491); and in the case of next of kin after twenty years. (*Sutton* v. *S.*, 22 C. D. 511, 517.)

Marshalling.—We have already seen that assets are applied in payment of debts in a certain order, but this is only as between the beneficiaries. It does not affect

the rights of creditors, who can resort to any portion of the assets they please for payment of their debts. It is clear, therefore, that a creditor may disturb the order, if he resorts to the assets in an order different from that which the law prescribes as between the beneficiaries; and if he does so matters are rectified between the beneficiaries by the application of the principle known as marshalling, which is that "a person having two funds to satisfy his demands shall not by his election disappoint a party who has only one fund." (1 Wh. & Tu. 46.) To restore then the order of administration the law permits the beneficiary who is disappointed by the creditor's action to stand in the creditor's place as against any fund which is in the order of administration liable before his own. Marshalling also takes place as between legatees where some are charged on land and some are not. (1 Wh. & Tu. 49.) The Court will not marshal assets in favour of a charity, but this, since the Mortmain Act, 1891, is of no importance.

CHAPTER XIII.

LEGACIES.

Classes of Legacies.—Legacies may be divided into three classes—specific, general and demonstrative. A specific legacy is a bequest of a particular article or sum of money, as a bequest of "my diamond ring" or "my £500 stock." A legacy is general when it is not a bequest of a particular article, as a bequest of "a ring" or "£500 stock." A legacy is demonstrative when it is in the nature of a general legacy, but there is a particular fund pointed out to satisfy it. Thus, a bequest of "£500 out of my £3 per cent. annuities" is a demonstrative legacy. These distinctions are of some importance, since a specific legacy will not abate if, after payment of debts, the assets are insufficient for payment of all the legacies, while a general legacy will. But if the article or sum specifically bequeathed is destroyed or alienated by the testator, the legacy is adeemed and the legatee is not entitled to compensation from the testator's estate.. A demonstrative legacy does not abate like a general legacy, until the fund out of which it is payable is exhausted, and is not adeemed by the failure of that fund which is only regarded as the primary fund for payment. (1 Wh. & Tu. 786.)

Jurisdiction.—No action lies to recover legacies, unless the executor has assented to them; because all the assets

vest in him and are liable to the payment of the testator's debts, and it is the duty of the executor, before he pays or assents to the legacies, to see whether there will be sufficient left to pay the debts, inasmuch as a man must be just before he is permitted to be generous. But after the executor has assented, the property vests immediately in the legatee, who may maintain an action for the recovery thereof.

Lapse.—If a legatee or devisee dies in the lifetime of the testator, the gift lapses and falls into the residue. To this rule there are two exceptions, namely (1) a devise in tail, (2) a gift to a child or other issue of the testator, provided in both cases that the person so dying leaves issue living at the death of the testator. (Wills Act, 1837, ss. 32, 33.)

Vested or Contingent.—A legacy may be either vested—that is, paid in all events, even though the payment be postponed—or contingent—that is, one payable only on a contingency happening. If a legacy is "payable" or "to be paid" at the age of twenty-one, it is vested, the time of payment only being postponed. But if a legacy is bequeathed "at" twenty-one, or "if" or "when" the legatee shall attain twenty-one, this is a contingent legacy and fails if the legatee dies before that age, unless interest is given in the meantime, when it is otherwise. (*Hanson* v. *Graham*, L. C. Conv. 822.)

There is, however, an important difference between purely personal legacies and those charged on real estate. If a legacy payable out of land is made payable at a certain age or other event personal to the legatee, and that event never happens, the legacy is not to be raised. (*Poulett* v. *P.*, 1 Vern. 204; *Chandos* v.

Talbot, 2 P. W. 601.) But if the payment is postponed until an event not referable to the person to be benefited, such as the death of the tenant for life, then it will be raisable, though the legatee die before that event. (*Evans* v. *Scott*, 1 H. L. C. 57: *Remnant* v. *Hood*, 2 D. F. & J. 396.)

Legacy given for a Purpose.—The fact that a legacy is given for some particular purpose does not make it contingent and prevent the legatee or his representatives receiving it, if that object cannot be effected. The purpose only shows the motive of the testator and is mere surplusage, and the legatee takes absolutely. (*Re Bowes*, (1896) 1 Ch. 507.)

Interest.—As a general rule, legacies carry interest at 3 per cent. after the lapse of one year from the testator's death. But in the following cases they carry interest from the testator's death, namely: (1) a legacy charged on land when not given subject to a life interest. (*Waters* v. *Boxer*, 42 C. D. 517.) (2) A legacy to a child where there is no other provision for its maintenance. (*Re Moody*, (1895) 1 Ch. 101.) (3) A legacy given in satisfaction of a debt. (*Clarke* v. *Sewell*, 3 Atk. 99.) (4) A specific legacy. (*Mullins* v. *Smith*, 1 Dr. & S. 210.)

When a legacy is given to a child contingently on his or her attaining twenty-one, the income accruing on the investments representing the legacy is by the Conv. Act, 1881, s. 43, available for the interim maintenance of the child during the contingency. (*Re Holford*, (1894) 3 Ch. 30; *Re Jeffery*, (1895) 2 Ch. 577.)

Priority.—A testator may give some legacies priority

over others; in which case, if the estate is insufficient, those having priority will be paid first and will not abate (*Wells* v. *Borwick*, 17 C. D. 798), and in general legacies given in satisfaction of debts have priority (*Stahlschmidt* v. *Lett*, 1 S. & G. 421), but a mere direction that a particular legacy is to be paid immediately on the death of the testator will not prevent it from abating even in the case of a wife. (*Oppenheimer* v. *Schweider*, (1891) 3 Ch. 44.)

Appropriation.—A legatee of an annuity for life or other determinable period is in genetal entitled to have it secured by the appropriation of a sufficient part of the residue (*Harbin* v. *Masterman*, (1895) W. N. 160, C. A.), or the annuity may be valued and the amount paid over. (*Re Sinclair*, (1897) 1 Ch. 921.) But a legatee has not an absolute right to have a future legacy brought into Court, whether it is in danger or not. (*Re Braithwaite*, 21 C. D. 121.)

CHAPTER XIV.

DONATIONES MORTIS CAUSA.

Definition.—A *donatio mortis causâ* is a gift of personal property made by one who apprehends that he is in peril of death. Of such a gift there are three essentials:—1. The gift must be with a view to the donor's death. 2. There must be an express or implied intention that the gift should only take effect on the donor's decease by his existing disorder. 3. There must be manual delivery of the property or of the means of obtaining possession of it. (Brett's L. C. 33.)

What may be the Subject of such Donations.—Thus, negotiable notes, promissory notes, payable to order, though not endorsed, bills of exchange, though not endorsed, bank notes, bankers' deposit notes, cheques drawn by a third person payable to the donor or order, though not endorsed by the donor, policies of insurance, bonds, and mortgages, receipts for money, and keys as affording the means of obtaining possession of the things given, may be the subject of such donations. (St. § 607a; Brett's L. C. 34; *Re Mead*, *Austin* v. *Mead*, 15 C. D. 651; *Clement* v. *Cheesman*, 27 C. D. 631.) But the delivery of a cheque drawn by the donor which was not presented before his death was held not to be a good *donatio mortis causâ*, because the death of the drawer is a revocation of the banker's

authority to pay (*Clement* v. *Cheesman*, *supra*), unless paid away for valuable consideration before his death. (*Rolls* v. *Pearce*, 5 C. D. 730.) And railway stock cannot be the subject of a *donatio mortis causâ*. (*Moore* v. *Moore*, 18 Eq. 474.)

Mixed Character of such Donations.—A donation of this kind partakes partly of the characteristics of a gift *inter vivos*, and partly of those of a legacy. It differs from a legacy in these respects: 1. It takes effect at once *sub modo* (*i.e.*, conditionally), and therefore does not require probate. 2. It requires no assent on the part of the executor or administrator to perfect the title of the donee. It differs from a gift *inter vivos* in certain respects, in which it resembles a legacy: 1. It is revocable during the donor's lifetime. 2. It might be made to the wife of the donor even before the stat. 45 & 46 Vict. c. 75, when a gift *inter vivos* by a man to his wife would have been void at law. 3. There must be delivery. 4. It was subject to probate duty, and is now subject to estate duty. 5. It is liable to the debts of the donor on a deficiency of assets. (St. § 606a; Brett's L. C. 33; Wms. on Exors. 681.)

Evidence.—Evidence of the clearest and most unequivocal character is requisite to support a *donatio mortis causâ*. (*Cosnahan* v. *Grice*, 15 Moo. P. C. 215.)

CHAPTER XV.

ELECTION, SATISFACTION, PERFORMANCE AND CONVERSION.

Election.—Election is the obligation to choose between two rights, by a person who derives one of them under an instrument in which a clear intention appears that he should not enjoy both. The doctrine rests upon the principle that a person shall not be allowed to approbate and reprobate; but if he approbates, he shall do all in his power to confirm the instrument he approbates.

The doctrine arises where a grantor or testator gives away either knowingly or by mistake that in which he has no interest, and in the same instrument makes a gift to the owner of the property so given away. In such cases the owner of the property cannot both take the gift and retain his own property. If he takes the gift, he must resign his own property. If he elects against the instrument, he cannot have the gift. But in the latter case he does not necessarily forfeit the entire gift, but only so much as will compensate the person whom he has disappointed by electing to take his own property; in other words, compensation, and not forfeiture, is the rule. (*Streatfield* v. *S.*, 1 Wh. & Tu. 416,)

As the doctrine of election depends on the principle of compensation, it follows that it is only applicable

where there is a fund out of which compensation can be made, or, in other words, where the donor puts into the gift some property that is actually his own. Thus, where a person has a special power of appointment, and he appoints part to persons objects of the power and part to persons not objects of the power, the former may set aside the excessive appointment and claim the amount thereby appointed, and also take the shares appointed to them, for here no part of the testator's property is given. (*Bristow* v. *Warde*, 2 Ves. jun. 336.) But if he appoints to non-objects and gives property of his own to the persons entitled in default of appointment, the latter must elect. (*Whistler* v. *Webster*, 2 Ves. jun. 367.) Parol evidence is not admitted to raise a case of election. (*Clementson* v. *Gandy*, 1 Keen, 309.)

The doctrine of election is founded on a presumed intention that effect shall be given to every part of an instrument, but this presumption is rebutted where the instrument expresses a contrary intention. (*Re Vardon*, 31 C. D. 275; *Hamilton* v. *H.*, (1892) 1 Ch. 396.)

An election may be express or implied by conduct. (*Padbury* v. *Clarke*, 2 Mac. & G. 298.) But an election will only be binding if made with knowledge of the facts and of the doctrine. (*Spread* v. *Morgan*, 11 H. L. C. 588; *Wilder* v. *Pigott*, 22 C. D. 263.) If, however, the person entitled to elect allows another so to deal with one of the properties that it would be inequitable to disturb the possessor, he will be estopped from doing so, though he did not know the facts. (*Dewar* v. *Maitland*, 2 Eq. 834.) If a person dies without having elected, and both properties devolve on the same person, he must elect (*Fytche* v. *F.*, 7 Eq. 409); and if a person does not elect within the time limited,

he will be deemed to have elected against the instrument. (*Ibid.*)

In the case of persons under disability, the Court will elect for them, either at once (*Streatfield* v. *S.*, *supra*) or after an inquiry in chambers. (*Brown* v. *B.*, 2 Eq. 481.)

Satisfaction.—The doctrine of satisfaction arises where a donor, being under some obligation to the donee, makes a gift under circumstances which indicate an intention that it shall be taken in satisfaction of the prior obligation. Where the intention is expressed, there is, of course, no difficulty; it is only the cases in which the intention is implied which call for notice. These are satisfaction of (1) legacies by portions and portions by legacies, (2) legacies by legacies, (3) debts by legacies.

A portion is a provision made for a child by a parent, and for this purpose a person may put himself *in loco parentis*, though the actual father is living. (*Polcys* v. *Mansfield*, 6 Sim. 644.) A parent is under an obligation to provide for his child, and therefore when a benefit is given to a child the Court regards it as a portion; and if afterwards a further benefit is given, it is to be taken not as an addition to the former portion, but in satisfaction of it. (*Ex parte Pye*, 2 Wh. & Tu. 366.) The Court, therefore, leans against double portions and in favour of satisfaction.

Where a person first makes an advance and afterwards makes provision by settlement or will, no question of satisfaction arises, for the first amount has been actually paid. But where the settlement comes first, and then a provision by will or an advancement, or where the will comes first and then provision by settle-

ment or advancement, the doctrine applies; and where the second sum given is less than the first, it operates as a satisfaction *pro tanto*. (*Pym* v. *Lockyer*, 5 My. & C. 29.) Whether the will comes first or the settlement is immaterial, the effect being the same, but in the first case it is called ademption and in the second satisfaction. (*Coventry* v. *Chichester*, 2 H. & M. 158.)

A difference in amount between the two benefits, or a slight difference in any other respect, will not prevent satisfaction (*Thynne* v. *Glengall*, 2 H. L. C. 131), but a substantial difference will. (*Tussaud* v. *T.*, 9 C. D. 363.)

Parol evidence is admissible to rebut the presumption of satisfaction, but not to raise a presumption, that is, not to raise a case of satisfaction. (2 Wh. & Tu. 392; *Re Lacon*, (1891) 2 Ch. 482.)

Where two separate legacies are given to the same legatee by the same instrument, they will be considered substitutional if of equal amount, but cumulative if unequal. (*Hooley* v. *Hatton*, 1 Wh. & Tu. 865.) But where they are given by different instruments they will be cumulative, whether equal or unequal (*Russell* v. *Dickson*, 4 H. L. C. 293), unless the same sum and the same motive is expressed in both. (*Ridges* v. *Morrison*, 1 Bro. C. C. 388.)

Where a legacy is given to a creditor as great as or greater than the debt, without any notice being taken of the debt, it will be in satisfaction of the debt. (*Talbot* v. *Shrewsbury*, 2 Wh. & Tu. 375.) But in this case the Court leans against the presumption. Therefore, a legacy less than the debt will not go in satisfaction even *pro tanto*. And a slight circumstance will exclude satisfaction, *e.g.*, a direction to pay debts (*Bradshaw* v. *Huish*, 43 C. D. 260), or where the time

for payment is different (*Calham* v. *Smith*, (1895) 1 Ch. 516), or where the legacy is of residue or contingent. (*Crichton* v. *C.*, (1895) 2 Ch. 853.) Further, there is no satisfaction where the debt was contracted after the will (*Wiggins* v. *Horlock*, 39 C. D. 142); but the doctrine applies where the debt is paid after the will. (*Re Fletcher*, 38 C. D. 373.)

Performance.—Performance, like satisfaction, rests upon the maxim, "Equity imputes an intention to fulfil an obligation;" but it differs from satisfaction as applied to debts in that performance is commonly deemed to have been effected *pro tanto*.

The typical case of performance is where a person covenants to do a certain act, and this covenant is deemed to be performed by some subsequent act which wholly or approximately effects the same purpose, though it does not expressly refer or precisely conform to the covenant. Thus, where a person covenants to purchase land of a certain value and settle it on his sons in tail, and he afterwards purchases land of that value, but makes no settlement, and the land descends to his eldest son, the land descended will be deemed a performance of the covenant (*Wilcocks* v. *W.*, 2 Vern. 558); but the property purchased must be of the same nature as that covenanted to be purchased. (*Lechmere* v. *L.*, 2 Wh. & Tu. 399.)

The doctrine also applies where the covenant is in effect wholly or partially performed by operation of law. Thus, if a man covenant before marriage to leave his wife a certain sum, and he dies intestate, his wife's share under the intestacy will be deemed a performance wholly or *pro tanto*. (*Blandy* v. *Widmore*, 2 Wh. & Tu. 407; *Gartshore* v. *Chalie*, 10 Ves. 14, 16.) But

this principle does not apply where the covenant is not to pay a gross sum, but an annuity or life interest (*Couch* v. *Stratton*, 4 Ves. 391); nor where the covenant is to pay in the covenantor's lifetime. (*Oliver* v. *Brickland*, 3 Atk. 420.)

Conversion.—The doctrine of conversion rests upon the principle that "Equity looks upon that as done which ought to be done." "Money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement, or otherwise." (*Fletcher* v. *Ashburner*, 1 Wh. & Tu. 327.) Thus, if a person contract to buy or sell land and die before completion, the property goes as if the transaction were completed; subject, however, to this, that the contract was one which the Court would enforce by specific performance. (*Cornwall* v. *Henson*, 48 W. R. 42.) In the case of a compulsory purchase there is no conversion until the price is fixed and the parties are *sui juris*. (*Kelland* v. *Fulford*, 6 C. D. 491.) In the case of an option of purchase the conversion relates back to the time when the option was given (*Re Isaacs*, (1894) 3 Ch. 506), unless there is a contrary intention. (*Re Pyle*, (1895) 1 Ch. 724.)

A direction to convert must be imperative. (*Bourne* v. *B.*, 2 Ha. 35.) But although apparently optional, if the trusts of money are only adapted to real estate, the money will be considered land. (*Earlom* v. *Saunders*, Amb. 241.) A direction to convert *on request* is usually imperative (*Burrell* v. *Baskerfield*, 11 Beav. 525), but a

mere power to convert is not. (*Pitman* v. *P.*, (1892) 1 Ch. 279.)

In the case of wills conversion takes place from the death of the testator; and in the case of deeds, from the date of their execution, even though the sale is not to take place until after the settlor's death. (*Clarke* v. *Franklin*, 4 K. & J. 257.)

When the purpose for which the conversion is directed fails, no conversion will take place, and the property will result to the testator or settlor in its original form. But if the failure is only partial, conversion will take place only to such extent as is necessary to effect the purpose of the will, and in so far as it is not required for that purpose the property will result unchanged. (*Ackroyd* v. *Smithson*, 1 Wh. & Tu. 372; *Jessop* v. *Watson*, 1 My. & K. 665; *Simmons* v. *Pitt*, 8 Ch. 978.) But in the case of a deed (*Griffith* v. *Ricketts*, 7 Ha. 299) or a sale under an order of the Court, a complete conversion takes place from the date of the deed or order, notwithstanding a partial failure of the purpose (*Hyett* v. *Meakin*, 25 C. D. 735), except where statutes direct the contrary, as in Partition Act, 1868, § 8, and Lunacy Act, 1890, § 123.

An heir takes land directed to be sold as personalty if the sale is or was necessary, whether it has taken place or not; in other words, he takes the property in the state in which he ought to find it (*Smith* v. *Claxton*, 4 Madd. 492; *Scales* v. *Heyhoe*, (1892) 1 Ch. 379); but if a sale was not necessary, he takes it as land. (*Davenport* v. *Coltman*, 12 Sim. 610.) Where money is directed to be laid out in land and the purpose partially fails, the undisposed-of interest goes to the

next of kin in the state in which he finds it. (*Curteis* v. *Wormauld*, 10 C. D. 172.)

Reconversion.—A person who is sole owner and *sui juris* may, of course, reconvert or elect to take the property in its original unconverted state. But if not sole owner, he cannot elect so as to bind any interests save his own, or so as to prejudice other persons interested. (*Holloway* v. *Radcliffe*, 23 Beav. 163.) Reconversion may be implied from very slight circumstances. (*Foxwell* v. *Lewis*, 30 C. D. 654.) And where money is "at home" and there is no interest outstanding, it will be considered as reconverted. (*Walrond* v. *Rosslyn*, 11 C. D. 640.)

CHAPTER XVI.

MORTGAGES.

A MORTGAGE may be defined as a debt secured on property, the legal ownership becoming vested in the creditor, while the equitable ownership remains in the debtor.

What may be Mortgaged.—Speaking generally, all kinds of property may be mortgaged, even an expectant or contingent interest. (*Coombe* v. *Carter*, 36 C. D. 348.) There are, however, certain species of property which, on the ground of public policy, cannot be mortgaged, as, for instance, half pay and the profits of an ecclesiastical benefice. Property may, moreover, be made defeasible on alienation or restrained from anticipation, and in either case cannot be mortgaged. And companies can only mortgage when and so far as they have power to do so. (*Ex parte Watson*, 21 Q. B. D. 301.)

Equity of Redemption.—Under the old common law a mortgage was simply a conveyance upon condition, and if the condition was not performed the mortgagee's estate became absolute, and the legal right to redeem was lost for ever. Equity, however, regarded the transaction as a mere security, and adjudged that the

breach of the condition should be relieved against, the result being that the mortgagor, though he lost his legal right to redeem, had an equity to redeem on payment within a reasonable time of principal, interest and costs. Here we have a good illustration of the maxim, "Equity regards the spirit and not the letter."

Regarding the spirit and not the letter, and viewing the transaction as a mere security, equity went further and held that the debtor could not, even by the most solemn engagement entered into at the time of the loan, preclude himself from his equitable right to redeem, for it was inequitable that a creditor should, through the necessities of his debtor, obtain a collateral or additional advantage beyond the payment of principal, interest and costs. Hence came to be established the two important principles that "once a mortgage always a mortgage," and that no clog or fetter can be imposed on the mortgagor's right or equity of redemption.

Once a Mortgage, always a Mortgage.—Once a mortgage, always a mortgage, is still a sound legal maxim, and a conveyance, though absolute in form, if intended as a security only, is redeemable. (*Barton* v. *Bank of New South Wales*, 15 A. C. 379.) Anything which is comprised in the mortgage must, when the debt is paid or the obligation is discharged, be returned to the mortgagor. It must be returned in its entirety, and no part can be retained by the mortgagee, who, when paid off, has no interest in the premises and no right to interfere with the mortgagor in his enjoyment or user of them. (*Rice* v. *Noakes & Co.*, (1900) 1 Ch. 213; *Salt* v. *M. Northampton*, (1892) A. C. 1.)

Clogging the Equity.—The principle that the equity

of redemption cannot be clogged is also still a sound legal principle, though the extension of the principle that the mortgagee can obtain no collateral advantage has been recently somewhat modified. A mortgagee may, provided the bargain is not unconscionable or oppressive, stipulate by the mortgage deed for a collateral advantage to himself; and if he does so there is no presumption that the mortgagor entered into the contract under pressure. (*Santley* v. *Wilde*, (1899) 2 Ch. 474.) Thus, a mortgagee of a public-house may stipulate that the loan shall continue for a period of years, and that during the security the mortgagor shall only sell beer supplied by the mortgagee. (*Biggs* v. *Hoddinott*, (1898) 2 Ch. 307; *Rice* v. *Noakes & Co.*, *supra*.)

Sale with Right of Re-purchase.—Mortgages must be distinguished from sales with a right of re-purchase within a certain time. (*Birmingham Canal Co.* v. *Cartwright*, 11 C. D. 421.) Whether the transaction is a mortgage or sale with right of re-purchase depends on the circumstances of each case (*Ex parte Odell*, 10 C. D. 76); and parol evidence is admissible to show that the transaction was merely a security. (*Douglas* v. *Calverwell*, 3 Giff. 251.) The distinction is important, since, if the transaction is a mortgage, the mortgagee has a right to redeem though the time for repayment has expired; but if it is a sale, the time for re-purchase must be exactly observed. (*Barrell* v. *Sabine*, 1 Vern. 268.)

Welsh Mortgage.—A Welsh mortgage, which is now very rare, is a mortgage in which there is no condition or covenant for repayment, the main incident of the

security being possession by the mortgagee of the mortgaged property until he has repaid himself out of the rents and profits. The mortgagee cannot foreclose or sue for the debt, but the mortgagor may claim to redeem. (1 Robbins, Mort. 26.)

Mortgagor's Rights.—An equity of redemption is an estate in the land, the person entitled thereto being, in equity, the real owner subject only to the rights of the mortgagee. (*Casborne* v. *Scarfe*, 1 Atk. 603.) Formerly at common law the position of the mortgagor as owner was hardly recognised at all, but his position has been much improved by recent legislation. By the Judicature Act, 1873, s. 25 (5), he may now sue in his own name only; and by the Conveyancing Act, 1881, s. 18, he has power to make leases subject to certain restrictions.

Who may Redeem.—The equity of redemption being an estate in the land, all persons entitled to any estate or interest in it are entitled to redeem, such as, an heir, devisee, purchaser, lessee (*Tarn* v. *Turner*, 39 C. D. 456), judgment creditor (*Bryant* v. *Bull*, 10 C. D. 153), tenant for life, remainderman or other limited owner; but as regards remaindermen and reversioners they cannot redeem against the wish of the tenant for life. (*Prout* v. *Cock*, (1896) 2 Ch. 808.) Whether a person is entitled to redeem will be decided by the Court without any offer to redeem. (*Nobbs* v. *Law Reversionary Society*, (1896) 2 Ch. 830.)

Everyone who has a right to redeem may redeem any prior incumbrancer on payment of principal, interest and costs, the redeeming party being in turn liable to be redeemed by those below him, and these latter being all

liable to be redeemed by the mortgagor. The practice in an action for foreclosure is to offer to redeem all incumbrancers prior to the plaintiff, and to claim foreclosure against all subsequent incumbrancers. This rule is sometimes expressed by the phrase: "Redeem up, foreclose down."

Keeping alive Charge.—Where a person redeems and extinguishes the charge, the redemption will enure to give the next incumbrancer the priority of the redeemed mortgage. It is important, therefore, in such cases that the prior mortgage should be kept alive for the protection of the person redeeming. This may be done by a declaration to that effect. But apart from any such declaration the charge will not be extinguished if there is no intention to extinguish it, and if it is for the benefit of the person redeeming to keep it alive. (*Liquidation Estates Co.* v. *Willoughby*, (1898) A. C. 321; *Gifford* v. *Fitzhardinge*, (1899) 2 Ch. 32.)

Increase of Interest.—The right to redeem after the day named for payment is founded on the strong leaning of courts of equity against penalties and forfeitures. For the same reason it was formerly held that a provision for payment of compound interest, if the interest was not punctually paid, was invalid. But this is not so now, at least as regards mortgages of reversionary interests. (*Clarkson* v. *Henderson*, 14 C. D. 348.) So a provision for increasing the rate of interest, if not punctually paid, is invalid as being in the nature of a penalty (Fisher, Mort. 866), though the same result may be attained by reserving the higher rate in the first instance with a proviso reducing it on punctual payment. (*Union Bank* v. *Ingram*, 16 C. D. 53.) But the fines and penal

payments in mortgages to building societies are recoverable. (*Provident Permanent Building Soc.* v. *Greenhill*, 9 C. D. 122.)

Six Months' Notice.—A person cannot, as of right, redeem before the time appointed (*West Derby Union* v. *Met. Life Soc.*, (1897) 1 Ch. 335); and after that time he must give six calendar months' notice of his intention to pay off the mortgage, and must then punctually pay or tender the money (*Leeds Theatre* v. *Broadbent* (1898), W. N. 1), or the mortgagee will be entitled to fresh notice. But if the mortgagee has demanded payment, or taken steps to recover the debt, or has taken possession (*Bovill* v. *Endle*, (1896) 1 Ch. 648), or if the mortgage is merely an equitable one (*Fitzgerald* v. *Mellersh*, (1892) 1 Ch. 385), he is not entitled to such notice or interest in lieu thereof. In a foreclosure action, however, he is entitled to interest up to the day specified for redemption. (*Hill* v. *Rowlands*, (1897) 2 Ch. 361.)

Arrears of Interest.—The mortgagee can only recover six years' arrears of interest where the money is charged on land and he attempts to recover it "by distress, action or suit." (3 & 4 Will. IV. c. 27, s. 42.) In all other cases his right is not limited. (*Re Marshfield*, 34 C. D. 721, 723.) It is not, therefore, limited in redemption actions (*Dingle* v. *Coppen*, 79 L. T. 693) or in mortgages of personalty other than leaseholds (*Mellersh* v. *Brown*, 45 C. D. 225), or where the mortgagee exercises his power of sale. (*Re Marshfield*, *supra*.)

Transfer.—By the Conv. Act, 1881, s. 15, a mortgagor can require a mortgagee, who has not been in

possession, instead of reconveying, to transfer the mortgage to any third person. And by Conv. Act, 1882, s. 12, this right belongs to each incumbrancer or mortgagor notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer shall prevail over that of the mortgagor.

Devolution.—By the Conv. Act, 1881, s. 30, the mortgaged estate now devolves upon the personal representatives of the mortgagee notwithstanding any testamentary disposition. But this does not apply to copyholds. (Copyhold Act, 1894, s. 88.)

Producing Title Deeds.—Formerly a mortgagee could not be compelled to produce the title deeds, until paid off; but by the Conv. Act, 1881, s. 16, a mortgagor is now entitled, at his own cost, to inspection of the deeds in the case of any mortgage made since the Act.

Mortgagee in Possession.—A mortgagee, once having taken possession, cannot go out of it again without the mortgagor's consent. (*Re Prytherch*, 42 C. D. 590.) He is liable to account not only for all rents and profits actually received, but for all moneys which, but for his wilful default, he might have received (*White* v. *City of London Brewery*, 42 C. D. 257; *Mayer* v. *Murray*, 8 C. D. 424); and he is liable to account, though he transfers his security, unless he transfers by the direction of the Court. (*Hall* v. *Heward*, 32 C. D. 430.) Furthermore, if he takes possession without sufficient reason, that is, if no interest is in arrear and it is not necessary for the protection of his security, annual rests will be made against him. (*Horlock* v. *Smith*, 1 Coll. 287.) The mortgagee is entitled to his costs, charges and

expenses properly incurred (*Nat. Prov. Bank* v. *Games*, 31 C. D. 582), but he cannot make any charge for his personal trouble. (*Mason* v. *Westerby*, 32 C. D. 206.) He must keep the premises in necessary repair, to the amount of the surplus rents. (*Godfrey* v. *Watson*, 3 Atk. 518.) He will also be allowed the expense of improvements where necessary or beneficial to the estate (*Astwood* v. *Cobbold*, (1894) A. C. 150), but he will not be allowed to improve the mortgagor out of his estate. (*Sandon* v. *Hooper*, 6 Beav. 246.) Under the Conv. Act, 1881, he may make leases (s. 18), and may cut and sell timber ripe for cutting (s. 19), and may appoint a receiver (s. 24). The mere fact that a mortgagee is in receipt of the rents and profits does not necessarily make him chargeable as mortgagee in possession, unless he has taken out of the mortgagor's hands the management of the estate. (*Noyes* v. *Pollock*, 32 C. D. 53.)

Tacking.—Where a third mortgagee lends his money without notice of a second mortgage and afterwards buys in the first legal mortgage, and so clothes himself with the legal estate, he may tack his security to the first mortgage, so as to squeeze out the second mortgage and gain priority over it. (*Brace* v. *Duchess of Marlborough*, 2 P. Wms. 491.) In other words, equity will tack both incumbrances together in his favour, so that the second mortgagee will not be permitted to redeem the first without redeeming the third also, on the principle that where the equities are equal the law shall prevail. And this is so although the third mortgagee get in the first mortgage *pendente lite*, that is, with notice, for it is sufficient if he had no notice at the time of lending his money. (*Marsh* v. *Lee*,

2 Wh. & Tu. 107.) It is, however, important to notice that the legal estate only gives priority where the equities are equal, and not where it would be inequitable; as, for instance, where the legal estate is held upon express trusts, or vested in a satisfied mortgagee. (*Taylor* v. *Russell*, (1892) A. C. 244.)

But if a judgment creditor buys in the first mortgage, although a legal mortgage, he cannot tack the mortgage to his judgment, for he did not lend his money directly on the security of the land (*Spencer* v. *Pearson*, 24 Beav. 266; *Davis* v. *Freethy*, 24 Q. B. D. 519), at least until the land is delivered in execution. (Fisher, Mortg. 566.)

On the other hand, if a first mortgagee, without notice and having the legal estate, lends a further sum to the mortgagor on a judgment, he can retain against a mesne mortgagee until both his securities are satisfied. (*Credland* v. *Potter*, 10 Ch. 8.)

A first mortgagee cannot make further advances as against a second mortgagee, even though he has covenanted in his mortgage to make such further advances (*West* v. *Williams*, (1899) 1 Ch. 132); and in this connection it may be noticed that a floating security only affects the property of the company unincumbered at the time of realization of the security. (*Gov. Sec. Investment Co.* v. *Manila Co.*, (1897) A. C. 81.)

A mortgagee, as we have seen, derives no advantage from getting in a prior mortgage unless he also obtains the legal estate, for among equitable incumbrancers the maxim *Qui prior est tempore potior est jure* applies; still, if one of them has a better right to call for the legal estate than the others, he will be in the same position as if he had obtained it. (*Cook* v. *Wilton*, 29 Beav. 100.)

Tacking applies in the case of building society mort-

gages equally as in the case of ordinary mortgages. (*Hosking* v. *Smith*, 13 A. C. 582.) But it does not apply to lands in Yorkshire, for there the date of registration determines the priority except in cases of fraud. (*Battison* v. *Hobson*, (1896) 2 Ch. 403.)

Consolidation.—The rule with regard to consolidation of mortgages still holds good where the mortgages were made before the Conv. Act, 1881, or where the Act is expressly excluded as is often the case. The Court, however, leans against the doctrine. (*Jennings* v. *Jordan*, 6 A. C. 698.) Consolidation may be described as the right of a mortgagee, having two or more securities from the same mortgagor, to refuse to allow him to redeem one without redeeming the other or others. The rule applies to equitable mortgages, and to mortgages of personalty, and as against an assignee of the equity of redemption, and also where mortgages to different persons become united in the same person (*Pledge* v. *White*, (1896) A. C. 187); but the mortgages must be vested in one and the same hand, and the possibility that they may become so vested is not enough. (*Riley* v. *Hall*, 79 L. T. 244.) The rule does not apply unless default has been made on all the securities. (*Cummins* v. *Fletcher*, 14 C. D. 699.) The Conv. Act, 1881, s. 17, now enables a mortgagor to redeem one security without the other, where one or both of them is made after the Act, and the Act is not excluded. A mortgagor cannot, however, redeem one of two or more properties included in one mortgage. (*Hall* v. *Heward*, 32 C. D. 430.)

Priority lost by Negligence.—Where a legal mortgage is executed, and the mortgagee makes proper inquiry

for the title deeds, and the mortgagor gives an apparently satisfactory reason for not producing them, the legal mortgage will not be postponed to a prior equitable mortgage of which the legal mortgagee had no notice. (*Agra Bank* v. *Barry*, L. R. 7 H. L. 135.) But if the first mortgagee, through fraud or gross negligence, allows the mortgagor to retain the title deeds or to get possession of them, he will be postponed to a subsequent mortgagee or purchaser without notice of the prior mortgage. Mere carelessness or want of prudence will not, however, postpone him; but he will be postponed if he has made no proper inquiry for the deeds, or has entrusted them to an agent who has been guilty of fraud. (*Brocklesby* v. *Temperance Bldg. Soc.*, (1895) A. C. 173; *Re Castell & Brown*, (1898) 1 Ch. 315; *Oliver* v. *Hinton*, (1899) 2 Ch. 264.)

Foreclosure.—Since equity allows a mortgagor a reasonable time to redeem, it is only equitable that if he does not do so he should be foreclosed his right of redemption. In foreclosure proceedings, which may be by originating summons (Ord. LV. r. 5a), an account is taken of what is due for principal, interest and costs, and a day is fixed (usually six months from the master's certificate) for payment. Where there are successive incumbrancers, successive periods of redemption for each will be allowed, if such incumbrancers claim and are entitled thereto. (*Doble* v. *Manley*, 28 C. D. 664.) If the amount certified is not paid by the prescribed time the foreclosure is made absolute; but if any rents are received by the mortgagee or receiver after the certificate and before the date fixed for redemption, a further account will be ordered and further time (a month) given to redeem. (*Cheston* v. *Wells*, (1893)

2 Ch. 151.) A foreclosure is, however, always liable to be reopened on special grounds, and the mortgagor may for good cause shown redeem even after foreclosure absolute. (Fisher, 931.) On the other hand, the mortgagee, where the estate is insufficient, may sue on his covenant even after foreclosure; but if he does so, he opens the foreclosure and the mortgagor may claim to redeem. But if the mortgagee has so dealt with the property as to be unable to restore it on full payment, he cannot sue on his covenant. (*Palmer* v. *Hendrie*, 27 Beav. 349.)

A mortgagee is, since the Judicature Acts, entitled to combine in one action a claim for foreclosure and a claim for immediate payment on the covenant (*Farrer* v. *Lacy, Hartland & Co.*, 31 C. D. 42); but there can, of course, be no personal judgment where there is no personal liability on the covenant, as where the defendant is a mere transferee of the equity of redemption (*Re Errington*, (1894) 1 Q. B. 11); and in such a case the original mortgagor remains liable on the covenant, though he may have rights over against the transferee. (*Kinnaid* v. *Trollope*, 39 C. D. 636.)

Sale by Court.—By the Conv. Act, 1881, s. 25, the Court may, in a foreclosure or redemption action, decree a sale at any time before the action is concluded (*Union Bank of London* v. *Ingram*, 20 C. D. 463), even on an interlocutory application (*Wootley* v. *Coleman*, 21 C. D. 169), and though the mortgagee's statutory power of sale has arisen. (*Brewer* v. *Square*, (1892) 2 Ch. 111.)

Sale under Power.—Where a mortgagee sells under his power, he is trustee of the surplus after retaining principal, interest and costs (*Thorne* v. *Heard*, (1895)

A. C. 495); but he is not otherwise a trustee. (*Hickson* v. *Darlow*, 23 C. D. 690.) If notice to the mortgagor is required to be given before exercising the power and it is not given, the mortgagee would be liable in damages to the mortgagor (*Hoole* v. *Smith*, 17 C. D. 434); nor would the purchaser in such a case be safe if he had express notice of the fact. (*Selwyn* v. *Garfitt*, 38 C. D. 273.) The mortgagor or a co-mortgagor may purchase under a *bonâ fide* exercise of the power (*Kennedy* v. *De Trafford*, (1897) A. C. 180), but a mortgagee may not, as a rule, become purchaser himself. (*Martineau* v. *Clowes*, 21 C. D. 857; *cf. Henderson* v. *Astwood*, (1894) A. C. 150.)

The statutory power rendered incident to all mortgages of land by deed by the Conv. Act, 1881, ss. 19—22, is not to be exercised unless (1) notice requiring payment has been given followed by three months' default; or (2) interest is in arrear for two months; or (3) there has been breach of some provision (other than the covenant to repay) in the mortgage or the Act.

Concurrent Remedies.—A mortgagee may pursue all his remedies at the same time; but an action for foreclosure and an action on the covenant should be joined in one action. (*Poulett* v. *Hill*, (1893) 1 Ch. 277.) If on a sale the estate proves insufficient, he may then sue on his covenant for the balance (*Rudge* v. *Richens*, 8 C. P. 358); but if, as we have already seen, he sues on the covenant after foreclosure absolute, he reopens the foreclosure.

Mortgage of Wife's Property.—Where a wife assigns property to her husband to enable him to borrow money on mortgage of it, she is entitled to the equity of re-

demption. (*Re Marlborough*, (1894) 2 Ch. 133.) But if she charges her property with money to pay her husband's debts, it is a matter of inference to be drawn from the circumstances whether she is entitled to be indemnified against the charge. (*Paget* v. *P.*, (1898) 1 Ch. 470.)

Equitable Mortgage.—The proper remedy of an equitable mortgagee by deposit is foreclosure (*Backhouse* v. *Charlton*, 8 C. D. 444); though the Court has power to direct a sale. (*Oldham* v. *Stringer*, 51 L. T. 895.) But where there is a mere charge or lien, the proper remedy is sale, not foreclosure. (*Re Owen*, (1894) 3 Ch. 220.)

Statute of Limitations.—By the Real Property Limitation Act, 1874, s. 7, the mortgagor's right to redeem is barred after twelve years' adverse possession by the mortgagee, and the latter's title then becomes absolute. Similarly, a foreclosure action must be brought within twelve years (*Horlock* v. *Ashberry*, 19 C. D. 539); but where the mortgagee is of a reversion, time only begins to run from its falling into possession. (*Hugill* v. *Wilkinson*, 38 C. D. 480.) An action on the covenant must also be brought within the same period, whether the covenant is in the mortgage deed or a separate instrument. (*Fernside* v. *Flint*, 22 C. D. 579; cf. *Re Frisby*, 43 C. D. 106.) But this does not apply to a mortgage of purely personal estate, as to which the time is still twenty years if the mortgage is under seal, and six years if it is not. (*Mellersh* v. *Brown*, 45 C. D. 225.) As between mortgagor and mortgagee no extension of time will be allowed in case of disability. (*Forster* v. *Patterson*, 17 C. D. 132.) A payment of rent does not keep a right of foreclosure alive unless made with the

knowledge of the mortgagor, or adopted by him (*Horlock* v. *Ashberry*, *supra*); nor does payment of interest by the mortgagor after he has parted with the equity of redemption. (*Newbould* v. *Smith*, 14 A. C. 423; cf. *Dibb* v. *Walker*, (1893) 2 Ch. 429.)

Liens.—An equitable lien exists independently of possession, and is in the nature of a charge, owing its origin to a trust created by agreement, express or implied. The most frequent instances are: the lien of a vendor of land for unpaid purchase-money; the lien of a trustee on the trust property for his costs; the lien on the interest of a *cestui que trust* for breach of trust. The purchaser as well as the vendor has a lien, though he cannot enforce it if the purchase goes off by his own default. (*Soper* v. *Arnold*, 14 A. C. 429.) A vendor may lose his lien by negligence, or may waive it by taking security in *substitution* for it. (*Ante*, p. 60.)

A solicitor's lien, though not an equitable one, may here be mentioned. It is of two kinds, viz., the lien on his client's papers, which is merely a passive right to withhold from his client until his bill is paid, and the lien on property recovered, which he can actively enforce under the Solicitors Act, 1860, s. 28.

Solicitor-Mortgagee.—By the Mortgagees' Legal Costs Act, 1895, a solicitor-mortgagee is entitled to the same costs as though he were retained by the mortgagee.

CHAPTER XVII.

PENALTIES AND FORFEITURES.

WHEREVER a penalty or forfeiture is imposed merely in order to secure some act or benefit, the act or benefit is the principal object, and the penalty or forfeiture, being only accessory, will be relieved against in equity. On the other hand, the Court will not allow a party to escape from his contract by merely paying the penalty. (*National Provincial Bank* v. *Marshall*, 40 C. D. 112.)

Penalties.—But every alternative payment is not a penalty. It is so where a smaller sum is secured by a larger, or where it is payable on the breach of *any* of several stipulations. (*Kemble* v. *Farren*, 6 Bing. 141.) But if the sum payable is proportioned to the breach (see *Willson* v. *Love*, (1896) 1 Q. B. 626), or is on one particular breach, and there is no means of taining the precise damage (*Law* v. *Local Board* ditch, (1892) 1 Q. B. 127), then it will not be a pe It is open to the parties to fix a sum as the just of damage, but if it is so disproportionate as to reality a penalty, equity will relieve against it. v. *Smith*, 21 C. D. 243.)

Forfeiture.—Equity would always relieve forfeiture for non-payment of rent, even where the term was gone at law by reason of the landlord's re-entry.

(*Howard* v. *Fanshawe*, (1895) 2 Ch. 581.) But no relief was granted in case of forfeiture for breach of any covenant other than a covenant to pay rent, except on the ground of accident, mistake or fraud. The jurisdiction to grant relief in case of forfeiture has, however, been considerably extended by the Conveyancing Act, 1881, s. 14, which provides that forfeiture for a breach of any covenant or condition shall not be enforceable until the lessor has given the lessee notice requiring him to remedy the particular breach and to make compensation, and the lessee fails within a reasonable time to comply; and the Court may, in any action by the lessor or lessee, grant relief on such terms as to costs, expenses, damages, compensation, penalty or otherwise, including an injunction to restrain any future breach as it thinks fit. The section, however, does not extend to (1) a covenant not to assign or underlet; (2) a condition of forfeiture on bankruptcy or execution; or (3) a covenant in a mining lease for permitting inspection, &c. by the lessor. But by the Conveyancing Act, 1892, s. 2, even forfeiture on bankruptcy or execution will now be relieved against in certain cases and under certain restrictions. And the Court may, it seems, relieve an underlessee on forfeiture of the superior lease even where it could not grant relief to the lessee himself. (*Imray* v. *Oakshette*, (1897) 2 Q. B. 218.) But no relief can be given under these Acts after actual re-entry by the lessor. (*Rogers* v. *Rice*, (1892) 2 Ch. 170.)

Where no Relief given.—Equity will not relieve against any penalty or forfeiture, imposed by statute; and on the other hand it will never enforce either a penalty or forfeiture, and therefore will not aid in divesting an estate for breach of covenant. (St. § 1319.)

CHAPTER XVIII.

PARTNERSHIP.

THE law of partnership is declared and to some extent codified by the Partnership Act, 1890, which defines partnership as "the relation which subsists between persons carrying on a business in common with a view of profit." Private partnerships, however, cannot consist of more than twenty members, and if a banking business of not more than ten persons. (Companies Act, 1862, s. 6.)

Test of Partnership.—The principle that mere sharing profits or receipt of payment varying with profits, though *primâ facie* evidence, is not sufficient of itself to constitute a partnership is amplified and defined by the Act, which provides (s. 2) that the following receipts do not *per se* make a person a partner, namely: (a) the receipt of a debt or other liquidated amount by instalments or otherwise out of profits, (b) remuneration of a servant or agent by a share of profits, (c) receipt by widow or child of a deceased partner by way of an annuity of a portion of the profits, (d) loan to business on a *written* contract that the lender is to receive interest varying with profits or a share of the profits, (e) receipt of a share of profits in consideration of the sale of the goodwill.

In the two last cases, however, no claim can be made on an insolvency in respect of share of profits until the other creditors are satisfied (s. 3; *Re Fort*, (1897) 2 Q. B. 495).

The true test of a partnership is the intention of the parties to be ascertained by a consideration of the facts of each particular case. (*Ex parte Tennant*, 6 C. D. 303.) On the one hand, the sharing of profits does not alone constitute a partnership. (*Walker* v. *Hirsch*, 27 C. D. 460; *Froude* v. *Williams*, 56 L. J. Q. B. 62.) On the other hand, if it appears that a partnership was in effect contemplated by the parties, its natural consequences cannot be evaded by procuring the advance of capital under the form of a loan. (*Pooley* v. *Driver*, 5 C. D. 458; *Ex parte Delhasse*, 7 C. D. 511.)

Specific performance of partnership agreements will not generally be decreed, unless there has been part performance. (*Scott* v. *Rayment*, 7 Eq. 112.)

Partnership Property.—All property brought into the partnership or acquired for the purposes and in the course of the partnership is partnership property, and must be held and applied exclusively for the partnership and in accordance with the partnership agreement (s. 20). But partnership land will devolve according to the tenure, but in trust, so far as necessary, for the persons beneficially interested under section 20.

Where co-owners of land, not being itself partnership property, are partners as to profits made by the use of it, and purchase other land out of the profits to be used in like manner, the land so purchased belongs to them not as partners but as co-owners (s. 20).

Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have

been bought on account of the firm (s. 21); and this is so as regards real estate. (*Clegg* v. *Fishwick*, 1 Mac. & G. 294.)

Partnership land, unless a contrary intention appears, is treated, as between the partners and their representatives, and as between the heir and personal representative of a deceased partner, as personal estate (s. 22).

The share of a partner is his proportion of the assets after they have been realized and the debts and liabilities paid; and it is this only which passes on his death to his representatives (ss. 39, 43, 44; *Noyes* v. *Crawley*, 10 C. D. 31).

Goodwill is a partnership asset; and in the absence of agreement, a partner has a right to have it sold on dissolution. (*Levy* v. *Walker*, 10 C. D. 436.)

Relation of Partners to Third Persons.—The acts of a partner done in the usual course of business bind the firm, unless he acts without authority, and the person with whom he deals has notice of the fact (ss. 5, 8); and if he pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound (s. 7).

A partner is jointly liable for the debts and obligations of the firm while he is a partner, and his estate is also severally liable after his death, subject to the prior payment of his separate debts (ss. 9, 17); and he is jointly and severally liable for the wrongful acts and omissions of his partner done in the ordinary course of business, and for the misapplication of property entrusted to the firm (s. 12).

One partner is not liable for another partner's breach of trust in employing trust funds in the partnership

business, unless he has notice of the breach of trust (s. 13).

If a person represents himself as partner he is liable as such to anyone who has given credit to the firm on the faith of such representation; but the executor of a deceased partner incurs no liability by the continued use of the firm name (s. 14). The principle of *holding out*, however, does not apply to liability in tort. (*Smith* v. *Bailey*, (1891) 2 Q. B. 403.)

Rights of Partners inter se.—The mutual rights and duties of partners may be varied by consent, either express or implied (s. 19). Subject to any agreement, partners are entitled to share equally in capital, profit and loss; each is entitled to be indemnified against payments and liabilities incurred in the ordinary course of business or in its preservation; each is entitled to 5 per cent. interest on advances made by him to the firm, but not to interest on the capital subscribed by him until the profits are ascertained (s. 24).

Partners must render accounts and full information to any partner or his representatives (s. 28). And each partner must account for any benefit derived by him from any transaction concerning the partnership, or from the use of the property name or business connection, even after dissolution by death, if the affairs are not completely wound up (s. 29). Further, he must account for all profits made by him in any business competing with that of the firm (s. 30).

As a general rule, an account will not be decreed, except with a view to a dissolution or to a sale of the business as a going concern (Lindley, 497), and in no case will a continuous account be directed. (*Fairthorne* v. *Weston*, 3 Ha. 387.)

Assignee of Share.—An assignee of a partner's share is not entitled, during the continuance of the partnership, to interfere in the business, to require accounts or inspect the books, but only to receive the share of profits assigned; and he must accept the account of profits agreed to by the partners. But on a dissolution, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of assets assigned, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution (s. 31).

Charging Order.—Execution cannot be issued against partnership property, except on a judgment against the firm (s. 23). But the Court may, on application by summons of any judgment creditor of a partner, make an order charging that partner's share in the partnership, and may appoint a receiver and give other necessary directions. The other partners may, however, redeem the interest charged or in case of a sale being directed, may purchase same (s. 23).

Arbitration.—Where partnership articles contain an arbitration clause proceedings may be stayed (*Bartlett* v. *Ford's Hotel*, (1896) A. C. 1); or the Court may revoke the submission or give directions to the arbitrator (*Robinson* v. *Davies*, 5 Q. B. D. 26); and by the award the arbitrator may decide even that the partnership shall be dissolved. (*Vawdrey* v. *Simpson*, (1896) 1 Ch. 166.) Either party may, however, apply to set aside the award. (*Re Palmer & Hosken*, (1898) 1 Q. B. 131.)

Dissolution.—A partnership may be dissolved by

effluxion of time or notice (s. 32), by death or bankruptcy (s. 33), by the business becoming unlawful (s. 34; *Thwaites* v. *Coulthwaite*, (1896) 1 Ch. 496), or, at the option of the other partners, by a charging order on a partner's share (s. 33); and in a proper case the Court can compel a partner to sign a notice of dissolution (s. 37; *Hendry* v. *Turner*, 32 C. D. 335).

Further, the Court may decree a dissolution in any of the following cases:—(1) Where a partner is permanently insane or permanently incapable of performing the partnership contract (s. 35; *Whitwell* v. *Arthur*, 35 Beav. 140); or (2) guilty of conduct calculated to injure the business (s. 35; *Harrison* v. *Tennant*, 21 Beav. 482); (3) where a partner commits persistent breaches of the articles, or so conducts himself that it is not reasonably practicable for the other partners to carry on the business with him (s. 35; *Leary* v. *Shout*, 33 Beav. 582); (4) when the business can only be carried on at a loss (s. 35; *Jennings* v. *Baddeley*, 3 K. &J. 78); (5) whenever it is just and equitable that the partnership should be dissolved (s. 35). As coming within the last-mentioned class, an assignment by a partner of his share may be a ground for seeking dissolution. (*Nerot* v. *Burnard*, 4 Russ. 247.) It should be added that a partnership induced by fraud will be dissolved as from its commencement (s. 41; *Rawlins* v. *Wickham*, 1 Giff. 355; *Maycock* v. *Beaton*, 13 C. D. 384); but generally speaking, the dissolution will operate only from the date of the judgment (*Lyon* v. *Tweddle*, 17 C. D. 529), or service of writ. (*Unsworth* v. *Jordan* (1896), W. N. 2.)

After dissolution the authority of partners to bind the firm continues so far as necessary to wind up the affairs,

but not otherwise (s. 38). But the firm is not bound by the acts of a bankrupt partner (s. 38).

On dissolution every partner is entitled to have the partnership property applied in payment of debts and liabilities, and the surplus applied in payment of what is due to the partners after deducting what is due from them to the firm, and for that purpose may apply to the Court to wind up the business (s. 39); and, in the absence of agreement to the contrary, to have the good-will sold. (Lindley, 445.)

Where a partnership is dissolved before the end of the term, otherwise than by death, the Court may order the repayment to a partner of any premium or part thereof, unless the dissolution is due to misconduct of the partner or was by agreement containing no provision for such repayment (s. 40; *Atwood* v. *Maule*, 3 Ch. 369).

An outgoing partner or his estate is, when the business is continued and in the absence of agreement, entitled either to such profits as are attributable to the use of his share, or to interest at 5 per cent. on such share (s. 42; *Yates* v. *Finn*, 13 C. D. 839).

The amount due to an outgoing partner or his estate is a simple contract debt accruing at the dissolution or death (s. 43), and therefore subject to the Statute of Limitations.

Joint and Separate Debts.—In administration of the joint and separate estates, the joint estate is to be applied in payment of joint debts, and the separate estate in payment of separate debts, and only the surplus of each estate is to be applied in satisfaction of the other class of creditors. (*Ex parte Dear*, 1 C. D. p. 519.)

A joint creditor may, however, prove in the first

instance against separate estate if the debt has been incurred by fraud (*Ex parte Salting*, 25 C. D. 148), or if there is no joint estate. (*Re Budgett*, (1894) 2 Ch. 555.)

No partner can prove in competition with creditors of the firm either against the joint or separate estate until all the debts of the firm have been paid. (Lindley, 739, 755.) There are, however, exceptions, as, for instance, where a partner carries on a separate business and becomes a creditor in the ordinary course of business, or where property has been fraudulently converted. (Lindley, 743, 756; Pollock, 154.)

CHAPTER XIX.

SPECIFIC PERFORMANCE.

Where no Relief given.—The foundation of the equitable jurisdiction in specific performance was the inadequacy of the common law remedy for breach of contract, the only remedy there being a claim for damages. Courts of equity will not, however, give relief in all cases of breach of contract, and will generally refuse specific performance in the following cases:—(1) Where the common law remedy is adequate, that is, where damages are a complete remedy (*Cuddee* v. *Rutter*, 2 Wh. & Tu. 416; *Glasse* v. *Woolgar* (1897), 41 Sol. J. 573); (2) Where the Court could not superintend or enforce the execution of its judgment, as in the case of a contract to build a house (*Stewart* v. *Kennedy*, 15 A. C. at p. 104; but see *Ryan* v. *Mutual Tontine, &c.*, (1893) 1 Ch. at p. 128); (3) Where the plaintiff is calling upon the defendant to do something which he is not lawfully competent to do (*Mortlock* v. *Buller*, 10 Ves. j. p. 311); (4) When it is doubtful whether the defendant meant to contract to the extent he is sought to be charged (*Harnett* v. *Yielding*, 2 S. & L. at p. 554); (5) When the Court cannot compel specific performance of the contract as a whole (*Ryan* v. *Mutual Tontine, &c., supra;* cf. *Odessa Tramways* v. *Mendel*, 8 C. D. p. 244); (6) Where the contract is without consideration and there-

fore a *nudum pactum* (*Jefferys* v. *J.*, Cr. & P. p. 141); (7) Where the contract is in its nature strictly personal, as for personal service (*Bainbridge* v. *Smith*, 41 C. D. p. 474); and (8) Generally where it would be unreasonable, unjust or impracticable. (*Stewart* v. *Kennedy*, *supra*; *Glasse* v. *Woolgar*, *supra*.)

Contracts relating to Land.—The jurisdiction is not confined to cases where the real estate is in England, but extends to contracts respecting land situate abroad (*Penn* v. *Lord Baltimore*, 1 Wh. & Tu. 755), and also extends to compulsory purchases. (*Re Piggott*, 18 C. D. p. 150.)

Statute of Frauds.—The right to sue on a contract concerning land is, as a rule, very materially affected by the Statute of Frauds (29 Car. II. c. 3), s. 4, which enacts that no action shall be brought on any contract concerning land, unless the contract or some memorandum or note thereof is in writing and signed by the party to be charged or his agent. Suits in equity, though not within the words, have always been considered as within the spirit and meaning of this enactment. (*Knox* v. *Gye*, L. R. 7 H. L. p. 674.) The statute does not render the contract void, but merely bars the remedy (*Rochefoucauld* v. *Boustead*, (1897) 1 Ch. at p. 207); and therefore, if the party sued chooses to waive the defect, the contract may be enforced. The statute relates to agreements for leases and all other contracts touching some interest in land, as, for instance, a contract to sell debentures charged on land (*Driver* v. *Broad*, (1893) 1 Q. B. 539); or even to sell building materials of a house still standing.

(*Lavery* v. *Pursell*, 39 C. D. 508.) The statute does not prescribe any particular form of document; therefore any kind of writing may do, as letters or telegrams. (*Re Hoyle*, (1893) 1 Ch. p. 100.) Further, the whole of the contract need not be in one document; it is enough if the several writings in substance form one document (*Pearce* v. *Gardner*, (1897) 1 Q. B. 688), or are sufficiently connected. (*Oliver* v. *Hunting*, 44 C. D. p. 207.) Where, however, the contract is constituted by correspondence, the whole correspondence must be looked at to see if there is a concluded contract. (*Hussey* v. *Horne-Payne*, 4 A. C. 311; *Bellamy* v. *Debenham*, 45 C. D. 481.) Where a person agrees to buy *subject* to a formal contract being prepared, there is no concluded contract until the formal contract is signed. (*Lloyd* v. *Nowell*, (1895) 2 Ch. 744.) *Secus*, if there is a simple acceptance of an offer, accompanied by a *desire* to have a formal contract. (*North* v. *Percival*, (1898) 2 Ch. 128.) Next, it is to be noted that the essential terms of the contract must be in writing, that is, the writing must show or provide the means of ascertaining: (1) Who are the contracting parties (*Sale* v. *Lambert*, 18 Eq. 1; *Potter* v. *Duffield*, *ib.* 4; *Filby* v. *Hounsell*, (1896) 2 Ch. p. 740); (2) what the subject-matter of the contract is (*Re Lander*, (1892) 3 Ch. p. 48); and (3) what is the price or consideration. (*Re Kharaskhoma, &c.*, (1897) 2 Ch. pp. 464, 467.) Parol evidence is admissible to clear up these points. (*Plant* v. *Bourne*, (1897) 2 Ch. 281; *Kelly* v. *Walsh*, 1 L. R. Ir. p. 283.) The statute further requires that the writing should be signed (*Evans* v. *Hoare*, (1892) 1 Q. B. p. 597) by the party to be charged or his agent duly authorised. (*Smith* v. *Webster*, 3 C. D. 49.) An auctioneer is the agent of both vendor and purchaser,

and is entitled to sign for both at the sale, but not afterwards. (*Bell* v. *Balls*, (1897) 1 Ch. 663.)

Exceptions.—The statute is binding on courts of equity; nevertheless those courts have held that certain contracts are to be excepted from its operation. These exceptions are cases of (1) fraud, (2) part performance, (3) admission by the defendant (*Att.-Gen.* v. *Day*, 1 Ves. p. 221), and (4) sale by the Court. (*Att.-Gen.* v. *Day*, *supra*.)

Fraud.—The object of the statute being to prevent fraud, it will not be allowed to be made an engine of fraud. (*Rochefoucauld* v. *Boustead*, (1897) 1 Ch. p. 206.) If, therefore, an agreement is not reduced into writing so as to satisfy the statute, by the fraud of one of the parties, equity will relieve even against the words of the statute.

Part Performance.—Where a parol contract has been partly performed, specific performance will be enforced, notwithstanding the absence of writing within the statute. It would be inequitable to allow a person who had entered and spent money on land, on the faith of a verbal contract, to be treated as a trespasser, and the other party to enjoy the benefit of the money so expended.

The acts relied upon as part performance must, however, be unequivocally and in their own nature referable to some such contract as that alleged. "It is not enough that an act done should be a condition of, or good consideration for a contract, unless it is, as between the parties, such a part execution as to change their relative positions as to the subject-matter of the contract."

(*Maddison* v. *Alderson*, 8 A. C. at p. 478.) With regard to what acts will be deemed a part performance, the following may be given as examples, viz.: possession of land taken, or even in some cases continued by one party, after the contract, with the knowledge and acquiescence of the other party (*Hodson* v. *Heuland*, (1896) 2 Ch. 428, 434); expenditure of money in alterations and repairs by the tenant with the landlord's approval (*Williams* v. *Evans*, 19 Eq. 547); payment of rent at an increased rate. (*Miller, &c.* v. *Sharp*, (1899) 1 Ch. 622.). On the other hand, acts of the following kind will not be deemed part performance, viz.: payment of purchase-money, unless there is evidence to connect it with the alleged contract (*Britain* v. *Rossiter*, 11 Q. B. D. 123); delivery of abstract or other similar acts of a preliminary and equivocal nature (St. § 762; *Maddison* v. *Alderson*, 8 A. C. p. 480), nor if the act is a condition precedent or merely negative (Brett's L. C. 291), nor is marriage in itself a part performance. (*Caton* v. *C.*, 1 Ch. p. 147; *cf. Ungley* v. *U.*, 5 C. D. 887.) The doctrine of part performance is not apparently confined to contracts relating to land. (*McManus* v. *Cooke*, 35 C. D. 681, 697.)

Defences.—Besides the cases already mentioned (*ante*, p. 126), in which the Court declines as a rule to enforce specific performance, there are other grounds of defence on which a defendant may rely. If a plaintiff come into equity he must come with clean hands, and will not be entitled to specific performance if he is himself in default (*Lamare* v. *Dixon*, L. R. 6 H. L. p. 428), or has been wilfully guilty of acts or omissions disentitling him to relief. (*Gregory* v. *Wilson*, 9 Ha. p. 686.) Further, there must be no delay on the part of the

plaintiff, for the Court will not give relief unless he comes promptly and as soon as the nature of the case will permit. (*Levy* v. *Stogdon*, (1899) 1 Ch. 5; *cf. Mills* v. *Haywood*, 6 C. D. 196.) Where time is of the essence of the contract, either by express provision or impliedly by reason of the circumstances (*Tadcaster, &c.* v. *Wilson*, (1897) 1 Ch. p. 711), non-observance of such time is generally fatal, unless there is a condition for payment of interest after the time fixed. (*Webb* v. *Hughes*, 10 Eq. 281.) And though time may not originally have been essential, it may be made so by notice fixing a reasonable time within which to complete. (*Green* v. *Sevin*, 13 C. D. 589.)

Misrepresentation.—Apart from fraud, a material misrepresentation, though innocent, will generally be a good defence if relied upon by the defendant, and was an inducement to the contract; indeed, it would not only be a defence but a ground for rescission. (*Wauton* v. *Coppard*, (1899) 1 Ch. p. 97.) If, however, the defendant knew all along the truth of the matter, the defence is not available (*Smith* v. *Chadwick*, 9 A. C. p. 196); though it is if, being possessed of the means of testing the truth, he did not avail himself of those means. (*Aaron's Reefs* v. *Twiss*, (1896) A. C. p. 279.) A misrepresentation may be made by conduct as well as words (*Andrew* v. *Aitken*, 31 W. R. 425); but mere general statements or mere puffing will not amount to misrepresentation. (*Dimmock* v. *Hallett*, 2 Ch. p. 27.)

Mistake.—A common mistake of both parties on a material point is a good defence. (*Cochrane* v. *Willis*, 1 Ch. 58.) Further, a mistake induced or contributed to by the plaintiff may afford a good defence (*Denny* v.

Hancock, 6 Ch. 1); and so may even a mistake on the part of the defendant (*Malins* v. *Freeman*, 2 Keen, p. 34); but it is not enough for him simply to state that he has made a mistake. (*Tamplin* v. *James*, 15 C. D. p. 217.) Mistakes of law as well as of fact may afford a defence. (*Allcard* v. *Walker*, (1896) 2 Ch. p. 381.)

Title.—It may be a defence that the title is doubtful or only a good holding title. (*Re Scott & Alvarez*, (1895) 2 Ch. 603.) Generally, if a vendor can make a good title at any time before the day fixed for completion of the contract, it will be enforced; but he cannot insist on the purchaser accepting the title of some third person who can make a good title. (*Re Bryant, &c.*, 44 C. D. p. 233.)

Other grounds of defence are incompleteness of contract (*Hart* v. *H.*, 18 C. D. p. 689), uncertainty of contract (*Ibid.* p. 685), illegality of contract (*Sykes* v. *Beadon*, 11 C. D. p. 193), hardship of contract (*Fry* v. *Lane*, 40 C. D. 312), want of mutuality, *e.g.*, contract by infant. (*Flight* v. *Bolland*, 4 Russ. p. 301.)

Compensation.—Where a vendor seeks to enforce the contract and he can perform his part substantially, though not according to the strict letter, the contract will be enforced with compensation to the purchaser for the deficiency. (*Calcraft* v. *Roebuck*, 1 Ves. j. 221; *Binks* v. *L. Rokeby*, 2 Swans. 222.) But where the purchaser is plaintiff, he is generally entitled to have a conveyance of all that the vendor can convey, though the difference is substantial, and compensation or abatement of purchase-money for the difference. (*Hooper* v. *Smart*, 18 Eq. 683; *Connor* v. *Potts* (1897), 1 Ir. R.

534.) Compensation, however, will not be allowed where there is misrepresentation by the vendor, or where the purchaser knew of the defect, or waived it. (*Clayton* v. *Leech*, 41 C. D. 103.) Nor will it be allowed where there is an express stipulation negativing it. (*Cordingly* v. *Cheeseborough*, 4 D. F. & J. 379.)

Damages.—Under the Judicature Act, 1873, courts of equity have now power to give damages for breach of contract, instead of or in addition to specific performance, and even where specific performance could not be granted. (*Jaques* v. *Millar*, 6 C. D. 153; *Elmore* v. *Pirrie*, 57 L. T. 333.) A purchaser is not entitled to damages for loss of his bargain, but only for expenses actually incurred. (*Re Scott & Alvarez*, (1895) 1 Ch. at p. 627.)

Parol Variation.—Notwithstanding the rule of law that parol evidence cannot be received to contradict a written contract, courts of equity have long held that parol evidence is admissible to show that the writing sued upon does not express the real bargain; and the Court will enforce performance with the parol variation, though it will not interfere where the effect of the parol evidence is to show that the parties were at cross purposes. (*Clowes* v. *Higginson*, 1 V. & B. p. 535.) Sometimes the Court allows the plaintiff to elect between having his action dismissed and having judgment for performance with variation. (*Rambottom* v. *Gosden*, 1 V. & B. p. 130.) Formerly it was held that only the defendant could adduce parol evidence in variation of the contract, but since the Judicature Act, 1873, the plaintiff is equally entitled to do so. (*Olley* v. *Fisher*, 34 C. D. 367.) A defendant may also show by parol evidence

that, notwithstanding the writing, there was no contract. (*Pattle* v. *Hornibrook*, (1897) 1 Ch. 25.)

Chattels.—It is only in cases where *chattels* are unique or of peculiar value to the plaintiff that the Court will specifically enforce contracts for sale and delivery of them (*Fothergill* v. *Rowland*, 17 Eq. p. 139); but apart from contract the Court can enforce delivery of heirlooms. (*Pusey* v. *Pusey*, 2 Wh. & Tu. 454.) A contract for sale of *shares* in companies may be specifically enforced. (*Nichol's Case*, 29 C. D. 428, 445.) But a contract for sale of *goodwill*, apart from the business premises will not. (*Darbey* v. *Whitaker*, 4 Drew. p. 139.) Nor will a contract to form and carry on a *partnership*, unless there has been part performance. (*Scott* v. *Rayment*, 7 Eq. p. 115.) A valid contract for the present *separation* of husband and wife may be enforced. (*Hart* v. *H.*, 18 C. D. 670.)

CHAPTER XX.

INJUNCTIONS AND RECEIVERS.

Restraining Proceedings.—Injunctions were formerly divided into common and special injunctions. A common injunction was an injunction to restrain proceedings in another court. Such injunctions are now abolished by the Judicature Act, 1873, s. 24 (5), and instead thereof, the judge in whose court any administration or winding-up proceedings are pending may now transfer to himself any cause or matter brought against the executor or administrator or the company in another court. (Ord. XLIX. 5.) But the Court will still restrain a person resident here from vexatious proceedings in a foreign court (*Hyman* v. *Helm*, 24 C. D. 531); and though it cannot restrain a *pending* action, it can still restrain the *institution* of proceedings. (*Hart* v. *H.*, 18 C. D. 670.)

Preventive or Mandatory.—What, therefore, were formerly called special injunctions are now practically the only ones, and these are granted to compel or restrain the doing of some particular act. The former are restorative or mandatory, and expressly direct the act in question to be done (*Jackson* v. *Normanby Brick Co.*, (1899) 1 Ch. 438); and these, as a rule, are only granted at the hearing. (*Von Joel* v. *Hornsey*, (1895) 2 Ch. 774.) The latter, which are by far the most

frequent, are preventive merely, and are, as we shall presently see, to restrain the violation of a right or the commission of a wrong.

Interlocutory or Perpetual.—Again, as regards duration, an injunction may be either perpetual or interlocutory—that is, merely temporary until the hearing. And in urgent cases an *interim* injunction may be obtained *ex parte*, extending over a day or two until a proper application on notice can be made; but this will only be done where delay would make it impossible or highly difficult to do complete justice at a later stage.

Jurisdiction.—The power of granting injunctions, "the strong arm of equity," is in an eminent degree discretionary. (*Low* v. *Innes*, 4 D. J. & S. p. 290.) But notwithstanding the power given by the Judicature Act, 1873, s. 25 (8), to grant injunctions whenever "just or convenient," it has been held that the effect of the Act is not to alter or extend the principles upon which the Court has always acted in granting injunctions. (*North London Rail.* v. *Great Northern Rail.*, 11 Q. B. D. 30; *Shelfer* v. *City of London*, (1895) 1 Ch. 287; *Kitts* v. *Moore*, (1895) 1 Q. B. 253.) Nor will an injunction be granted unless it is both just *and* convenient. (*Beddow* v. *B.*, 9 C. D. 89.) Further, an injunction is a "formidable legal weapon" and will not be granted in a trivial case. (*Llandudno, &c.* v. *Wood*, 48 W. R. 43.)

Whilst, however, it is true that the Judicature Act did not enlarge the jurisdiction of the Court, it has enabled the Court to grant injunctions where it *in practice* never did so, as, for example, in trespass and in the case of a first mortgagee who was out of possession. (*Cummins* v. *Perkins*, (1899) 1 Ch. p. 20.) Further

certain technical difficulties which affected the right to an injunction in the case of threatened waste or trespass have been removed. (*See Stocker* v. *Planet Bldg. Soc.*, 27 W. R. 793.) Again, the Act enables the Court to restrain the publication of a libel (*Quartz Hill Co.* v. *Beall*, 20 C. D. 501; *Monson* v. *Tussaud*, (1894) 1 Q. B. 671), which it could not previously do. And the interference of the Court is no longer confined to cases where there is some question of property. (*Aslatt* v. *C. Southampton*, 16 C. D. p. 148.)

It should, however, be remembered that the very first principle of injunction law is, that you do not obtain injunctions for actionable wrongs for which damages are the proper remedy. (*London & Blackwall Rail.* v. *Cross*, 31 C. D. p. 369.)

The two principal heads of equity jurisdiction by injunction are: (1) to restrain the breach of a contract, either express or implied; (2) to prevent the commission of wrongs independent of contract.

Where a contract is affirmative in form the proper remedy is specific performance; but if there be a *negative stipulation*, an injunction can be obtained to restrain a breach of it. (*Doherty* v. *Allman*, 3 A. C. p. 720; but see *Donnell* v. *Bennett*, 22 C. D. at p. 837.) A covenant which, though positive in form, is negative in character can be enforced by injunction (*Catt* v. *Tourle*, 4 Ch. 654); and, conversely, a contract negative in form, but affirmative in character and substance, cannot be so enforced. (*Davis* v. *Foreman*, (1894) 3 Ch. 654; but see *Donnell* v. *Bennett*, *supra.*)

The cases in which the object is to prevent the commission of a wrong are very numerous, the principal being waste, trespass, nuisance, infringement of patents, &c.; all of which, however, are developments of the

general principle, that an injunction is only granted where damages would not be an adequate remedy. (Pollock on Torts, p. 187.)

Where an injunction is sought to restrain the threatened violation of a legal right, it must be shown that there is an actual intention to do the act complained of or a claim of right to do the act. (Kerr, 13.)

There is no longer a writ of injunction: an injunction is now by judgment or order. (Ord. L. 11.)

Damages.—The Court has power to award damages either in lieu of or in addition to an injunction. And, as a general rule, damages will be granted instead of an injunction if the injury is small and can be compensated by a small money payment, and if it would be oppressive to grant an injunction. (*Shelfer* v. *City of London, &c.*, (1895) 1 Ch. p. 322.)

Delay.—An application for an injunction should be prompt; for delay or acquiescence may be fatal, especially in the case of a mandatory injunction. (*Gaskin* v. *Balls*, 13 C. D. 324.)

Waste.—The Court will not usually restrain permissive waste; but it will restrain equitable waste, *e.g.*, pulling down a mansion-house or cutting ornamental timber. (*Garth* v. *Cotton*, 2 Wh. & Tu. 971.) But waste will only be restrained where prejudicial to the inheritance, and if it is ameliorating waste it will not be restrained (*Meux* v. *Cobley*, (1892) 2 Ch. 253); but a countervailing advantage will not prevent an injury to the inheritance from being restrained. (*West Ham, &c.* v. *East London, &c.*, 48 W. R. 284.)

Nuisance.—In proceedings to restrain a public nuisance the Attorney-General is a necessary party, but the title "Information" is no longer used. (*Att.-Gen.* v. *Shrewsbury, &c.*, 42 L. T. 79.) A private nuisance will only be restrained where the mischief is irreparable or a constantly recurring grievance (*Fleming* v. *Hislop*, 11 A. C. 686); and there must be an inconvenience "materially interfering with the ordinary comfort, physically, of human existence." (*Walter* v. *Selfe*, 4 De G. & S. 323.)

Light and Air.—Also, where a person builds so near the house of another as to darken his windows against the clear right of the latter, either by contract or by ancient possession, the Court will interfere by injunction (*Broomfield* v. *Williams*, (1897) 1 Ch. 602; *Lazarus* v. *A. P. Co.*, (1897) 2 Ch. 214), unless damages would be substantial compensation. (*Martin* v. *Price*, (1894) 1 Ch. 276.) And the same remarks apply also to access of air through a definite aperture or channel. (*Aldin* v. *Latimer*, (1894) 2 Ch. 437; *Chastey* v. *Ackland*, (1895) 2 Ch. 389.)

Lateral Support, &c.—So a landowner having a right to lateral support may have an injunction in maintenance of such right (*Hunt* v. *Peake*, Johns. 705), and in like manner he will be protected against the flooding of his land by his neighbour (*Evans* v. *Manchester, &c.*, 36 C. D. 626) or the pollution of his stream. (*Ogsdon* v. *Aberdeen Tramways*, (1897) A. C. 111.)

Arbitration.—The Court has no jurisdiction to restrain by injunction a party from proceeding with an arbitration in a matter beyond the agreement to refer

(*North London Rail.* v. *G. N. Rail.*, 11 Q. B. D. 30), nor a party proceeding without authority in an arbitration (*Farrar* v. *Cooper*, 44 C. D. 323), unless an action has been brought impeaching the agreement of reference itself. (*Kitts* v. *Moore*, (1895) 1 Q. B. 253.)

Infringement.—The infringement of patents, trade marks and copyright will be restrained by injunction in order to prevent irreparable mischief and multiplicity of suits. And the Court will grant an interlocutory injunction where it is satisfied as to the validity of the patent. (*Dudgeon* v. *Thompson*, 30 L. T. 244.) In the case of copyright registration is necessary. (*Johnson* v. *Newnes*, (1894) 3 Ch. 663.) But independently of statute, the Court will restrain the use of marks and names calculated to mislead the public. (*Powell* v. *Birmingham*, 12 T. L. R. 310.)

Breach of Trust.—There are also many cases in which injunctions are granted to restrain a breach of trust or other improper dealing with trust property. (Lewin, 1041.)

Expulsion from Club.—An injunction will be granted to restrain the expulsion of a member from a club where there has been any irregularity in the proceeding. (*Labouchere* v. *Wharncliffe*, 13 C. D. 346.) But the Court will not interfere unless what has been done is contrary to the rules, or there has been *mala fides* or malice, or the rules are contrary to natural justice (*Dawkins* v. *Antrobus*, 17 C. D. 615), nor where the club is proprietary. (*Baird* v. *Wells*, 44 C. D. 661.)

Libel.—The Court may now in every case restrain a libel (*Salomons* v. *Knight*, (1891) 2 Ch. 294), even by

interlocutory injunction in a clear case. (*Monson* v. *Tussaud*, (1894) 1 Q. B. 671.)

Ne Exeat.—Somewhat akin to an injunction is the writ of the *exeat regno* which was issued to prevent a person from leaving the realm. But this has been practically superseded by the Debtors Act, 1869, which provides for the arrest of a debtor going abroad. (*See Drover* v. *Beyer*, 13 C. D. 242.)

Receivers.—By the Judicature Act, 1873, s. 25 (8), a receiver may be appointed by an interlocutory order in all cases in which it shall appear to the Court to be just or convenient, and either unconditionally or upon terms. This gives the Court a large discretion (*Foxwell* v. *Van Grutten*, (1897) 1 Ch. 64), and has enlarged the powers of the Court, though it has not altered the character of the remedy. The old weapon is simply put into different hands and can only be used where it was used before. (*Holmes* v. *Millage*, (1893) 1 Q. B. 551.) Nevertheless the Court will now appoint a receiver where formerly no appointment would have been made. Thus, a receiver may be appointed on the application of any party, and even after final judgment if the judgment remains unsatisfied (*Fordham* v. *Claggett*, 20 C. D. 637), or at the instance of mortgagee in possession (*County of Gloucester Bank* v. *Rudry, &c.*, (1895) 1 Ch. 629), or at the instance of a judgment creditor who has not issued an elegit (*Salt* v. *Cooper*, 16 C. D. 544), or of the separate property of a married woman, where there is no restraint on anticipation. (*Cummins* v. *Perkins*, (1899) 1 Ch. 16.)

In considering whether a receiver should be appointed, the Court must have regard to (a) the amount of the

debt; (b) the amount which the receiver will probably recover; (c) the costs of his appointment. (Ord. L. 15 a.)

A receiver must ordinarily give security, and has no title until it is given; but in urgent cases an interim receiver will be appointed without security. (*Taylor* v. *Eckersley*, 2 C. D. 203.) He is regarded as an officer of the Court, and must keep his accounts in manner prescribed. (Ord. L. 18.)

CHAPTER XXI.

ACCOUNT.

Jurisdiction.—The taking of accounts is assigned to the Chancery Division. The Queen's Bench Division has no machinery for taking complicated accounts, and an action for such accounts will be transferred to the Chancery Division. (*Leslie* v. *Clifford*, 50 L. T. 590.)

Open and Settled Accounts.—Accounts are either open or settled. An open account is one of which the balance is not struck, or which is not accepted by both parties. A settled account is one that is accepted by both parties. This acceptance may be implied from circumstances, as where no objection is made to the account within a reasonable time. (*Parkinson* v. *Hanbury*, L. R. 2 H. L. 1.)

Opening, Surcharging and Falsifying.—It is ordinarily a good bar to an action for account that the account has been settled. But if there is any mistake, omission, accident or fraud, equity will interfere—in some cases by directing the whole account to be opened and taken *de novo;* in others by allowing it to stand, with liberty to the plaintiff to surcharge and falsify. The showing an omission for which credit ought to have been given is a surcharge; the proving an item to be wrongly in-

serted is a falsification. The *onus probandi* is always on the party having liberty to surcharge and falsify; and the liberty extends to errors of law as well as of fact. In ordinary cases the rule is, that a single mistake is sufficient to entitle to surcharge and falsify. But a settled account will not generally be opened, especially after a long time has elapsed, except in cases of fraud. (Williams on Account, 51 *et seq.*)

It is the first duty of an accounting party, whether trustee, executor, agent or receiver, not only to keep proper accounts, but to be constantly ready with them. (*Ibid.* 162.)

Appropriation of Payments.—A debtor making a payment has a right to appropriate it to the discharge of any debt due to his creditor. And such appropriation may be inferred; thus, an intention to discharge a secured debt before an unsecured one will be presumed. (*Young* v. *English*, 7 Beav. 10.) But the right is lost unless exercised at the time of payment. (*Wilkinson* v. *Sterne*, 9 Mod. 427.)

If there is no such appropriation by the debtor, the creditor has the right and may appropriate at any time before action brought or account settled (*Simson* v. *Ingham*, 2 B. & C. 65), and even in discharge of a statute-barred debt. (*Nash* v. *Hodgson*, 4 D. M. & G. 474.)

If no appropriation is made by either debtor or creditor, the rule in *Clayton's Case* (1 Mer. 585) applies, and an appropriation is made by presumption of law according to the order of the items of account; the first item on the debit side being discharged by the first item on the credit side. And, in general, payments will be appropriated to interest before principal. (*Parr's Bank-*

ing Co. v. *Yates*, (1898) 2 Q. B. 460.) The rule, however, is based on intention (*Cory & Co.* v. *The Mecca*, (1897) A. C. 286), and therefore the presumption may be rebutted by circumstances or evidence.

Set-off.—Equity allows a set-off in all cases where, though the debts arise from independent transactions, the credit is mutual—that is, where the party incurring the second debt did so in reliance on the former debt as a means of discharging it. But there is no set-off between debts accrued in different rights; for instance, a joint debt against a separate debt or *vice versâ*, or a debt due from a person individually against a debt due to him as executor or *vice versâ* (*Re Gregson*, 36 C. D. 223), though he may set off costs due to him as executor from a legatee against the legacy. (*Re Jones*, (1897) 2 Ch. 190.) Further, the equity of third persons will sometimes intervene to prevent a set-off. Thus, a shareholder in a winding-up cannot set off a debt due to him from the company against calls due from him. (*Grissell's Case*, 1 Ch. 528.)

CHAPTER XXII.

INFANTS.

Guardians.—The father is the natural guardian of his children, and under 12 Car. II. c. 24, can appoint guardians. The Guardianship of Infants Act, 1886, has, however, introduced great changes in the law respecting guardianship of infants in favour of maternal rights. It provides that on the death of the father the mother is to be guardian, either alone or jointly with any guardian appointed by the father. Where no guardian has been appointed by the father, or is dead, or refuses to act, the Court may appoint a guardian or guardians to act jointly with the mother (s. 2). The only ground for the interference of the Court in such cases is the benefit of the infant. (*Re X.*, (1899) 1 Ch. 526.) The Act further provides that the mother may, by deed or will, appoint a guardian after the death of herself and the father to act jointly with the guardian (if any) appointed by the father; and may provisionally nominate a guardian to act jointly with the father after her death, and the Court may confirm the appointment if the father is unfit to be sole guardian, and if the guardians disagree any of them may apply to the Court (s. 3). By s. 6 the Court may remove any guardian and appoint another in his place.

By the Custody of Infants Act, 1891, the Court has full power and discretion to refuse the custody of his child to a parent who has deserted it, or has so conducted himself as to disentitle him to the assistance of the Court, or has been unmindful of his duties in allowing another person to bring it up. But the Court has power, even where it deprives the parent of the custody, to order that the infant shall be brought up in the religion on which the parent has a right to insist (s. 4).

Under the Guardianship of Infants Act, 1886, s. 5, the Court may, upon the application of the mother of any infant, make such order as it thinks fit regarding the custody of such infant and the right of access thereto of either parent. The position of father and mother in respect of the custody of their children is materially altered by this section. (*Re A. & B.*, (1897) 1 Ch. 786.)

Religion.—Although it is the right of the father to have the custody of his children and to have them brought up in his own religion, the welfare of the infants is the paramount consideration, and the Court will, in a proper case, deprive him of the custody and disregard his wishes as to their religious education. (*Re Newton*, (1896) 1 Ch. 740.) The rule that the father has the right to decide the religious education of his children, and that after his death the guardians are bound to see that they are brought up in the religion of their father, is unaffected by the Act of 1886. (*Re Scanlan*, 40 C. D. 215.) By s. 7 of that Act, in case of divorce or judicial separation, the Court may declare the guilty parent unfit to have the custody of the children.

Conversion.—Guardians may not change the nature of the property unless it is manifestly for the benefit of the infant; indeed, it has been said that there must be an overwhelming necessity for the conversion (*Camden* v. *Murray*, 16 C. D. 161, 171), and they can only raise money for repairs in cases which amount to actual salvage. (*Jackson* v. *Talbot*, 21 C. D. 786.)

Wards of Court.—Properly speaking, a ward of Court is a person who is under a guardian appointed by the Court. But whenever proceedings are instituted relating to the person or property of an infant, he is treated as a ward of court. Thus a mere order for maintenance without suit, or mere payment into Court, are sufficient (*Re Graham*, 10 Eq. 530; *Brown* v. *Collins*, 25 C. D. 56), or an order for custody (*Re Taylor*, 4 C. D. 157), but not if the infant is an alien. (*Brown* v. *Collins*, 25 C. D. 56.)

Maintenance.—Where property is given to a child, whether absolutely or contingently on his attaining twenty-one, the income is, by the Conveyancing Act, 1881, s. 43, available for his maintenance, if the bequest carries the right to intermediate income (*Re Holford*, (1894) 3 Ch. 30; *Arnold* v. *Burt*, (1895) 2 Ch. 577); and this is so though the interest is directed to be accumulated, and though the income of the parents is considerable. (*Hunt* v. *Parry*, 32 C. D. 383; *King-Harman* v. *Cayley*, (1899) 1 Ir. R. 39.) A liberal allowance will sometimes be made to an infant to enable him to assist his brothers and sisters or his parents. (*Bradshaw* v. *B.*, 1 J. & W. 647; *Re Roper*, 11 C. D. 272.) Where the property is small, maintenance will

sometimes be directed to be paid out of capital. (*Barlow* v. *Grant*, 1 Vern. 254; *Re Tuer*, 32 C. D. 39.)

In the absence of an express power trustees can only advance an infant at their own risk, since they will not be allowed the sum paid unless the Court approves. And as a rule advancement can only be made out of a fund to which the infant is absolutely entitled (*Lee* v. *Brown*, 4 Ves. 362), and if the father is unable to do it. (*Ex parte Hays*, 3 De G. & S. 485.)

Settlements.—On the marriage of a ward, the Court will see that a proper settlement is made, even though she has come of age and is ready to waive her right to a settlement. (St. § 1361.) But the Court has no power to order a settlement of the property of an infant not a ward (*Re Potter*, 7 Eq. 484), except under the Marriage Act (4 Geo. IV. c. 76), where a minor has married without the guardian's consent. (*Re Phillips*, 34 C. D. 467.) And under the Infants Settlement Act (18 & 19 Vict. c. 43), infants can, with the sanction of the Court, make binding marriage settlements when they have attained the age of twenty-one, if males, or seventeen if females, although the marriage may have taken place before such age. (*Re Phillips*, *supra.*) But an infant's settlement, though made without the sanction of the Court, is not void, but merely voidable; it is valid until disaffirmed, and unless repudiated within a reasonable time is absolutely binding. (*Viditz* v. *O'Hagan*, (1899) 2 Ch. 569.)

CHAPTER XXIII.

MARRIED WOMEN.

At common law the husband was entitled to the rents and profits of his wife's realty during their joint lives, and after her death, if there was issue born, during the remainder of his life, as tenant by the curtesy. He was also entitled to his wife's personalty absolutely, subject to the necessity of reducing her choses in action into possession.

Separate Estate.—But equity has long recognized a right in the wife to enjoy property apart from her husband, and a wife's separate estate may exist in property of every kind. Separate estate was formerly created by any apt words showing an intention to exclude the husband. And it may be limited to a particular coverture (*Stogdon* v. *Lee*, (1891) 1 Q. B. 661), or be attached to the whole life interest or even to an estate in fee (*Bagget* v. *Meux*, 1 Coll. 138), or to an absolute interest in personalty. (*Re Grey*, 34 C. D. 712.) But now, by the M. W. P. Act, 1882, ss. 1, 5, every woman married after 1882, and every woman married before 1883 as regards property acquired by her after 1882, is capable of acquiring, holding and disposing of real or personal property as separate property as if she were a *feme sole* without the intervention

of any trustee. (*Re Cuno*, 43 C. D. 12; *Hope* v. *H.*, (1892) 2 Ch. 336, 341.) As regards women married before the Act who acquire property after it, the date when the title, whether vested or contingent, was acquired and not when the property falls into possession determines whether it is separate estate within the Act (*Reid* v. *R.*, 31 C. D. 402; *Re Dixon*, 35 C. D. 4); but a mere *spes successionis* is not a title. (*Re Parsons*, 45 C. D. 51.) The title which accrues under the exercise of a power of appointment is deemed to accrue from the date of the operation of the appointment and not from the date of the instrument giving the power. (*Sweetapple* v. *Horlock*, 11 C. D. 745; *Lovett* v. *L.*, (1898) 1 Ch. 82; but see *Re Jackson*, 13 C. D. 189, 201.)

Power to Dispose of Separate Estate.—Though a married woman may now dispose of her property as if she were a *feme sole* (M. W. P. Act, 1882, ss. 1, 2; *Riddell* v. *Errington*, 26 C. D. 220), and may convey or surrender property of which she is *bare* trustee as if she were a *feme sole* (Trustee Act, 1893, s. 16; *Re Brooke*, (1898) 1 Ch. at p. 651); yet where she is trustee of land she cannot even now convey it except with her husband's concurrence and by deed acknowledged. (*Re Harkness*, (1896) 2 Ch. 358; as to acknowledgment, see now Conv. Act, 1882, s. 7); but where she is a mortgagee she may convey as a *feme sole*. (*Re Brooke*, (1898) 1 Ch. 647.)

As regards the will of a married woman, the Act of 1882 applied only to property acquired during coverture, and so property acquired afterwards did not pass by her will made during coverture. (*Re Price*, 28 C. D. 709.) But now, by the M. W. P. Act, 1893, s. 3, her will, though made during coverture, speaks from her

death, and therefore includes all property to which she dies entitled. (*Re Wylie*, (1895) 2 Ch. 116.)

Restraint on Anticipation.—In order to protect her separate estate against the undue influence of her husband or others, equity allowed a married woman to be restrained from alienating it or anticipating the income (*Pybus* v. *Smith*, 3 Bro. C. C. 339), though such a restraint was, generally speaking, invalid in the case of a man or unmarried woman. (*Brandon* v. *Robinson*, 18 Ves. 429.) But such a restraint is subject to the rule against perpetuities, and if it may extend beyond a life or lives in being and twenty-one years afterwards effect will not be given to it. (*Re Ridley*, 11 C. D. 645; *Herbert* v. *Webster*, 15 C. D. 610; *Cooper* v. *Laroche*, 17 C. D. 368.)

A trust for the separate use of a married woman is no longer necessary in order to impose a restraint on anticipation, which may now be annexed to her property though not in terms limited to her separate use and only made so by force of the Act. (*Re Lumley*, (1896) 2 Ch. 690.)

Separate estate exists only during coverture, and restraint being a modification of separate estate has no independent existence. It is inoperative or disattaches during discoverture, but revives on every subsequent marriage, if apt words are used. (*Tullett* v. *Armstrong*, 1 Wh. & Tu. 709; *Re Wheeler*, 48 W. R. 10.) But if, being discovert, she converts the property, the separate use, and with it the restraint on anticipation, are determined. (*Wright* v. *W.*, 2 J. & H. 647.) And though now, on her re-marriage, her property would become separate estate under the Act, *semble* the restraint will be gone.

By the Conv. Act, 1881, s. 39, the Court has power to bind the separate estate of a married woman, notwithstanding a restraint on anticipation. This, however, does not give the Court a general power to remove the restraint, but only to make binding a particular disposition for her benefit. (*Re Warren*, 52 L. J. Ch. 928; Brett's L. C. 104.) Good ground must be shown, and the mere wish of the married woman is not sufficient. (*Tamplin* v. *Miller*, 30 W. R. 422.) It must be for her own benefit, and will not be removed to pay debts of herself or husband. (*Re Pollard*, (1896) 2 Ch. 552; but see *Paget* v. *P.*, (1898) 1 Ch. 470.) Her separate examination is not necessary. (*Hodges* v. *H.*, 20 C. D. 749; but see *Musgrave* v. *Sandeman*, 48 L. T. 215.) Except under the Act the restraint cannot be removed (*Smith* v. *Lucas*, 18 C. D. 531), and she cannot deprive herself of the income by estoppel. (*Bateman* v. *Faber*, (1898) 1 Ch. 144.)

Further, the Court has now power under the Trustee Act, 1893, s. 45, to impound her separate estate subject to restraint in order to make good her breach of trust. (*Bolton* v. *Curre*, (1895) 1 Ch. 544.) And by the M. W. P. Act, 1893, s. 2, costs in proceedings instituted by her may be ordered to be paid out of such property. (*Hood-Barrs* v. *Heriot*, (1897) A. C. 177.)

Devolution.—Since the wife now takes as a *feme sole* and is a separate individual, the husband takes nothing in his marital right during the coverture. But the Act does not take away his rights in her property after her death or alter the devolution of her property. He is still, therefore, entitled beneficially to the personal estate of his wife dying intestate, and to the right to take out letters of administration (*Re Lambert*, 39 C. D. 626;

Smart v. *Tranter*, 43 C. D. 587; *Re Atkinson*, (1898) 1 Ch. 637), though how far the latter is necessary seems doubtful. (*Surman* v. *Wharton*, (1891) 1 Q. B. 491; Wolst. 264.) His estate by the curtesy still exists. (*Hope* v. *H.*, (1892) 2 Ch. 336.)

Under the Intestates' Estates Act, 1890, where a man dies intestate, *leaving no issue*, his widow takes all his property if under 500*l.*, or if more, a charge for 500*l.* as well as her share of residue.

Contracts.—A married woman's debts and contracts now bind her separate property, whether she had any separate estate at the time or not, and also bind all separate property thereafter acquired by her, and are enforceable against her property whether covert or discovert (see M. W. P. Act, 1893, s. 1), but not separate property which she is restrained from anticipating. (*Ibid.*; but consider *Re Wheeler*, (1899) 2 Ch. 717.)

A judgment against a married woman is not a personal one, but only against her separate estate. (*Scott* v. *Morley*, 20 Q. B. D. 120; *Downe* v. *Fletcher*, 21 Q. B. D. 11; *Pelton* v. *Harrison*, (1892) 1 Q. B. 118.) She cannot therefore be made bankrupt unless she is trading separately from her husband (*Re a Debtor*, (1898) 2 Q. B. 576), and not always then. (*Re Handford*, (1899) 1 Q. B. 566.)

Covenants.—The Act does not interfere with or affect settlements. (*Re Armstrong*, 21 Q. B. D. 270.) It is sufficient if she alone covenants to settle her future property. But the covenant of the husband alone still binds the wife's property, though made her separate property under the Act. (*Hancock* v. *H.*, 38 C. D. 78;

Stevens v. *Trevor-Garrick*, (1893) 2 Ch. 307.) The covenant of an infant wife is binding until disaffirmed, and unless repudiated within a reasonable time after coming of age. (*Viditz* v. *O'Hagan*, 68 L. J. Ch. 553.)

Ante-nuptial Debts.—A woman married after the Act is liable to the extent of her separate estate for her ante-nuptial debts, contracts and torts, and her husband is also liable, and may be sued with or without her, but he is only liable to the extent of his wife's property acquired by him (*Re Parkin*, (1892) 3 Ch. 510), and as between him and her he is entitled to be indemnified out of her separate property (ss. 13—15; *Jay* v. *Robinson*, 25 Q. B. D. 467; *Beck* v. *Pierce*, 23 Q. B. D. 316). The husband is still liable for the post-nuptial torts of his wife. (*Seroka* v. *Kattenberg*, 17 Q. B. D. 177; *Earle* v. *Kingscote*, (1899) 2 Ch. 203.)

General Power of Appointment.—The execution of a general power by will by a married woman has the effect of making the property liable for her debts and liabilities (s. 4; *Re Ann*, (1894) 1 Ch. 549) which she was capable of contracting as a *feme sole* before or after the Act. (*Re Hughes*, (1898) 1 Ch. 529.)

Loans.—A loan by a wife to a husband may be recovered (*Re Dixon*, (1899) 2 Ch. 561), but if made for the purpose of his business it is treated as assets of the husband in case of his bankruptcy or insolvency, and she can only claim after the other creditors (s. 3; *Mackintosh* v. *Pogose*, (1895) 1 Ch. 505; *Re Leng*, (1895) 1 Ch. 652); *secus*, if the loan is to a firm of which the husband is a partner (*Re Tuff*, 19 Q. B. D.

88; *Re Clark*, (1898) 2 Q. B. 330), and she may retain as administratrix in respect of such a loan. (*Re May*, 45 C. D. 499.)

Statute of Limitations.—Under the Statutes of Limitation there is no longer a saving in favour of a wife on account of the disability of coverture (ss. 1 (2), 24); and a married woman's debt to her husband is within the Statute (*Re Hastings*, 35 C. D. 94); but her right in equity against her husband in respect of her separate property is not. (*Wassell* v. *Leggatt*, (1896) 1 Ch. 554.)

Executrix.—A married woman may act as executrix or administratrix without her husband, as if she were a *feme sole* (s. 18; *Re Hawksworth* (1887), W. N. 113), and as such may exercise her right of retainer (*Re May*, *supra*), and is liable for a devastavit and to attachment (*Re Turnbull*, (1900) 1 Ch. 180); but her husband is not liable unless he has intermeddled (s. 24), and he need not join in the administration bond. (*Re Ayres*, 8 P. D. 168.)

Joint Tenancy.—Under a gift to husband and wife, in terms which would make them joint tenants if they were not married, they will no longer take as one person or hold by entireties, but take as joint tenants in the same manner as two unmarried persons. (*Thornley* v. *T.*, (1893) 2 Ch. 229.) But husband and wife still take only one moiety where there is a gift to them and a third person. (*Re Jupp*, 39 C. D. 148; *Re Dixon*, 42 C. D. 306.) Also, marriage is no longer a severance of the wife's joint tenancy in chattels passing by delivery (*Re Butler*, 38 C. D. 286); and it

never was as regards freeholds and leaseholds. (*Palmer* v. *Rich*, (1897) 1 Ch. 134.)

Separation Deeds.—A wife may enter into a valid and binding contract with her husband for separation by deed, or even by word of mouth, and for such a deed no trustee is necessary. (*McGregor* v. *M.*, 21 Q. B. D. 424; and see *Wilson* v. *Glossop*, 20 *ib.* 354.)

All questions between husband and wife relating to property may be decided by summons or otherwise in a summary way (s. 17; *Phillips* v. *P.*, 13 P. D. 220; *Tasker* v. *T.*, (1895) P. 1; *Wood* v. *W.*, 14 P. D. 157).

Pin-money and Paraphernalia.—Pin-money may be defined as a yearly allowance settled upon the wife before marriage for her own personal expenditure. Paraphernalia consist of apparel and ornaments suitable to her rank and condition, given to her by her husband; the wife could not dispose of them during her husband's life, and they were liable to his debts. A gift of jewels by a husband to a wife will not, however, be paraphernalia unless he impressed that character upon them, but will belong to her as her separate property. (*Tasker* v. *T.*, (1895) P. 1.)

Fraud on Marital Rights.—The M. W. P. Act, 1882, seems to render obsolete, as to women married after 1882, all the cases as to fraud on the husband's marital rights, and also, as regards property devolving after 1882 on any married woman, all the cases as to reduction into possession, and as to her equity to a settlement. (Wolst. 262.) These subjects are therefore omitted as being of little practical importance.

CHAPTER XXIV.

PARTITION.

SINCE the year 1833 equity has had exclusive jurisdiction in partition proceedings, which are now assigned to the Chancery Division. But under the Partition Act, 1868, the Court may, and in some cases must, direct a sale instead of a partition.

Formerly a partition was effected by issuing a commission; but in modern practice no commission is issued, the partition being made in chambers where any inquiry is necessary or at the hearing where no inquiry is necessary. (1 Wh. & Tu. 202; *Mayfair Property Co.* v. *Johnston*, (1894) 1 Ch. 508.) The new remedy of sale under the Partition Acts, 1868 and 1876, has, however, to a great extent superseded the old remedy of partition as being in most cases obviously more convenient.

Where a sale is asked for, partition may be ordered, and *vice versâ*. (P. Act, 1876, s. 7.) And the Court may order partition of one part and sale of another part of the property. (*Roebuck* v. *Chadebet*, 8 Eq. 127.)

Under the Act of 1868, ss. 3—5, the Court *may* direct a sale whenever it would be more beneficial than a partition, or if one party requires a sale and the other parties interested do not undertake to buy his share. But the Court *must* direct a sale if parties interested to

the extent of one moiety request a sale, unless it sees good reason to the contrary. (*Porter* v. *Lopes*, 7 C. D. 358.)

A sale will not be directed where there is an overriding trust, as distinguished from a mere power of sale (*Boyd* v. *Allen*, 24 C. D. 622), nor as against mortgagees. (*Sinclair* v. *James*, (1894) 3 Ch. 554.) A reversioner cannot maintain an action for partition (*Evans* v. *Bagshaw*, 5 Ch. 340); but an order will be made in an action by or against a tenant for life or years. (*Mason* v. *Keays*, 78 L. T. 33.) By the Act of 1876, s. 6, persons under disability may request a sale or give an undertaking; and by s. 3, the Court may dispense with service and make an order for sale, though all the persons interested are not before it. The sale may take place out of Court if all the parties are before the Court (Ord. LI. r. 1a), and infants may be declared trustees and a person appointed to convey their shares. (*Davis* v. *Ingram*, (1897) 1 Ch. 477.)

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